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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

NICK O., by his mother, and Guardian Ad Litem, JANE O., on behalf of himself and all others similarly situated,

Plaintiff,

v.

C.A. TERHUNE, in his official capacity as Director of the California Youth Authority; RICHARD TILLSON, in his official capacity as Superintendent

Case No. CIV S-89-0755-RAR-JFM

STIPULATION AND ORDER

of the Northern Reception Center - Clinic,

Defendants.

This Stipulation and Order ("Stipulation") is made and entered into by and between counsel for plaintiff and counsel for defendants to resolve the above entitled class action lawsuit.

RECITALS AND REPRESENTATIONS

A. The complaint in this action was filed on May 25, 1989, on behalf of plaintiff, Nick O., and all others similarly situated and alleges that defendants violated plaintiffs' rights under the Education of the Handicapped Act, 20 U.S.C. §§ 1401 et seq., (EHA), the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Federal Civil Rights Act, 42 U.S.C. § 1983, and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

B. The defendants filed an answer to the complaint on September 20, 1989, denying any such violations.

C. The undersigned counsel are authorized by their clients to enter into this Stipulation and to take all steps required pursuant thereto.

D. The parties represent to the Court that this Stipulation is fair, reasonable, and adequate to protect the class in accordance with the standards of Rule 23(e) of the Federal Rules of Civil Procedure.

E. The Stipulation is not to be construed as an admission of liability or violation of law by the defendants. Defendants have

entered into this Stipulation for the purpose of settling disputed contentions and controversies arising from this action.

F. This Stipulation shall not be effective until it has been signed by counsel on behalf of the parties listed on the signature page, and approved by a United States District Judge for the Eastern District of California. If the Stipulation does not become effective, it will be deemed part of negotiations for settlement purposes only; it will not be admissible to prove or disprove the allegations in the complaint; and all rights, claims and defenses that existed apart from the Stipulation shall be automatically restored to the parties.

NOW THEREFORE, the parties hereby stipulate that a judgment be entered which shall incorporate the following terms and conditions.

I. JURISDICTION

1. This court has jurisdiction of the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1343(3) and 1343(4) and personal jurisdiction over the named defendants to this action.

II. PARTIES AND THE SETTLEMENT CLASS

2. Plaintiffs in this action are the named plaintiff, Nick O., by and through his guardian ad litem, Jane O., and the plaintiff class which includes all current and future wards of the California Youth Authority who are educationally handicapped. The term "educationally handicapped" as used throughout this Stipulation shall also include the term "individuals with exceptional needs".

3. The parties stipulate that this action is properly maintained as a class action under Rule 23(a), Federal Rules of Civil Procedure and is appropriately designated as coming within the provisions of Rule 23(b) of the Federal Rules of Civil Procedure.

4. The defendants are C. A. Terhune, in his official capacity as Director of the California Youth Authority, and Richard Tillson, in his official capacity as Superintendent of the California Youth Authority's Northern Reception Center-Clinic.

5. When finally filed with the Court, this Stipulation shall be binding on the plaintiffs and the named defendants, their agents, employees, assignees, and successors.

6. California Education Code provisions are referred to in this Stipulation to help assure that individuals with exceptional needs are provided the programs and services that they are entitled to under federal law, and are in no way intended to abrogate or restrict any rights such individuals have under federal law.

III. NOTICE TO THE CLASS

7. Pursuant to Rule 23(e), the defendants shall, within fourteen (14) days after the Court's approval of the proposed notice attached as Exhibit A, post at all facilities operated by the California Youth Authority, in conspicuous places which the youth frequent, the notice in the form approved by the Court. Members of the class shall have 30 days after such posting within which to submit to counsel for the plaintiffs any inquiries or objections they may have. Counsel for plaintiffs shall promptly forward copies of any such inquiries or objections to counsel for the defendants

and to the Court. On the copies to be submitted to the defendants, the names of the wards will be deleted if the wards so request. Following the expiration of the time for submitting any objections, the Court will approve the Stipulation as submitted or schedule a hearing for the purposes of considering approval of the Stipulation.

IV. DEFENDANTS' OBLIGATIONS

A. Appropriate Education for Handicapped Children

8. Defendants will ensure that all class members are provided with a free appropriate public education, including special education and related services, in the least restrictive environment consistent with their unique needs in compliance with 20 U.S.C. §§ 1400, 1401, 1412, 1414(a)(1)(C)(iv); 34 C.F.R. §§ 300.1, 300.300, 300.550-556; California Education Code (EC) §§ 56001, 56026(a), 56030.5, 56031.

B. Identification and Screening

9. The defendants will develop and implement procedures and policies to identify wards entering the California Youth Authority (CYA) facilities who are or may be handicapped as defined in 20 U.S.C. §§ 1401(a)(1),(15), 1412(2)(C); 34 C.F.R. § 300.5; EC §§ 56026, 56300-56303. This will include but not be limited to:

a. A system sufficient to accomplish within five working days of each ward's delivery to a CYA institution or facility, (i) identification of each ward previously identified by public schools or other qualified agency as eligible for special

education and related services, (ii) a telephonic or written request of prior school or other agency records and documentation regarding the ward's special educational needs, and (iii) communications with the ward's parent or guardian and administrator of last public school attended by the ward concerning the special educational needs of such ward.

b. A system sufficient to assure effective screening by qualified personnel of all entering wards for the purpose of identifying within 15 working days of entry into CYA each handicapped ward who has not been previously identified by a public school or other qualified agency as meeting the criteria for assessment as an individual with exceptional needs.

C. Development and Implementation of Individual Educational Programs

10. The defendants will develop and implement an assessment system for development of Individual Educational Programs (IEP) that complies with the requirements of 20 U.S.C. §§ 1401(19), 1412(2)(B), (4), (5)(C), (6); 1414(a)(5); 34 C.F.R. §§ 300.340-300.349, 300.530-300.543; EC §§ 56320-56329, 56333, 56337-56338, 56340-56347, 56380-56381. The term "assessment" as used throughout this Stipulation shall also mean "evaluation" as used in 34 C.F.R. §§ 300.1 et. seq.

11. For each ward identified as handicapped or as an individual with exceptional needs by a public school or other qualified agency prior to the ward's commitment to CYA, the defendants will immediately place the student in a comparable program as required by Education Code section 5625 for a period not to exceed 30 days by which time an IEP review will have been conducted in conformity with paragraphs 13-17 of this Stipulation.

12. Each ward not covered by paragraph 11 who CYA has identified as an individual who may have exceptional needs (as described in paragraph 9(b)), shall be referred for a full and complete assessment by an appropriate assessment team with specialists in any areas in which a ward has, or is suspected to have, a handicap, in compliance with 20 U.S.C. §§ 1411, 1412(5)(C); 34 C.F.R. §§ 300.532, 300.540--300.543; EC §§ 56320-56324, 56326-56327, 56329, 56333, 56337, 56341.

a. Within 15 days of a referral for assessment, the defendants shall prepare and mail to the ward's parent, guardian, or surrogate parent a proposed assessment plan.

b. Testing used in assessments shall be appropriate for and applicable to the establishment of the existence of disabilities that affect learning, in compliance with 20 U.S.C, §§ 1412(5)(C); 34 C.F.R. § 300.532; EC § 56320.

13. An IEP required as the result of an assessment of a

ward, shall be developed within 50 days from the date of the receipt of the parent's, guardian's, or surrogate parent's written consent for assessment, unless the parent, guardian or surrogate parent agrees to an extension.

14. If the parent, guardian, surrogate parent or qualified staff person so requests, an IEP meeting to review an IEP that was developed subsequent to the ward's entry into CYA shall be held within 30 days after the receipt of the request.

15. The defendants shall ensure that the ward's parent, guardian, or surrogate parent, as defined in 34 C.F.R. §§ 300.10, 300.514; EC § 56028, 56050, is present at each IEP meeting or is afforded the opportunity to participate, in compliance with 20 U.S.C. §§ 1401(19), 1415(a); 34 C.F.R. § 300.345; EC 56321, 56341(b)(3)(F), 56506.

16. The IEP shall be individualized and shall contain a statement of the student's present level of educational performance, a statement of specific short-term measurable instructional objectives within the capability of the ward, and a statement of the special education and related services to be provided to the student, in compliance with 20 U.S.C. §§ 1401(19) 1412(4), 1414(a)(5); 34 C.F.R. § 300.346; EC § 56345. When the IEP team determines that the ward needs such services, the IEP shall include a statement of short-term instructional objectives for vocational programs to be provided to the student and the integration of vocational programs into the special education program of the student.

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17. The IEP shall specifically require related services as defined in 20 U.S.C. § 1401(17); 34 C.F.R. § 300.13, EC § 56363 where these are necessary to enable a student to benefit from an educational program.

18. The goals and short term instructional objectives of the IEP shall be reviewed regularly by the school staff to determine whether the goals and objectives are being met, whether specified services are being provided, and whether modifications are necessary, in compliance with 20 U.S.C. §§ 1401 (19), 1412(4), 1414(a)(5); 34 C.F.R. §§ 300.343(d), 300.346; EC §§ 56343, 56347, 56380-56381.

D. Provision of Special Education and Related Services

19. The defendants shall provide special education and related services in the amount and type specified in each ward's IEP as required by 20 U.S.C. §§ 1401(16), (17), (19), 1412(4), (5)(B); 1415(a)(5); 34 C.F.R. §§ 300.13-300.14, 300.346, 300.551; EC §§ 56031, 56345, 56360-56361, 56363. Education services shall be individualized and shall address the specific disabilities of wards in compliance with 20 U.S.C. §§ 1401; 34 C.F.R. § 300.1(a); EC §§ 56000-56001, 56031.

20. The defendants will ensure that there are adequate and appropriate numbers of qualified staff, as defined in 34 C.F.R. § 300.12, to provide special education and related services to wards. Special education teachers shall meet all state certification requirements in the area in which they will be providing special education or related services, in compliance with 20

U.S.C §§ 1413(a)(3); 34 C.F.R. § 300.12; EC §§ 56060-56063, 56362, 56362.5, 56362.7, 56368.

21. The obligation to provide appropriate special education and related services and to ensure that there are adequate numbers of qualified staff to carry out this responsibility applies to all facilities operated by the California Youth Authority, including the Northern Reception Center-Clinic in Sacramento.

22. In compliance with 20 U.S.C. § 1413 (a)(3); 34 C.F.R. § 300.380-387; EC §§ 56240-56243, the defendants will provide ongoing training to appropriate personnel to assure proper identification of handicapped students and provision of needed special education services.

E. Procedural Safeguards

23. The defendants will ensure that the procedural safeguards mandated by 20 U.S.C. §§ 1415, 1417(c); 34 C.F.R. §§ 300.500-514 and 300.560-576; EC 56340, 56342-56347; 56500.1-56507, are provided to all class members and their parents.

V. PLAN TO FULFILL DEFENDANTS' OBLIGATIONS

24. Defendants will make all revisions in their Special Education Procedures Manual necessary to fulfill their obligations within 30 days from entry of this Stipulation by the Court.

25. a. Defendants will implement a system to identify and screen wards who are or may be handicapped, as described in Paragraph 9 within 90 days of the entry of this Stipulated Judgment.

b. Defendants will fill needed special educational staff positions or retain any needed contractual services within 90

days from the entry of this Stipulated Judgment. As positions become vacant defendants will fill needed special education staff positions or retain any needed contractual services within 90 days of such vacancies.

26. Defendants shall assure that all of the obligations and responsibilities set forth in this agreement are fulfilled and all necessary policies and procedures are fully implemented within six months from the date of the entry of this Stipulated Judgment.

VI. ASSESSMENT AND MONITORING

27. Defendants will provide plaintiff's counsel with a monthly report no later than the 20th day of the following month setting forth the following information for each CYA institution: (a) the number of wards referred to the school consultation team; (b) the number of wards the school consultation team referred to special education; (c) the number of interim special education placements reviewed; (d) the number of wards screened for special education eligibility; (e) the number of wards referred for special education assessments; (f) the number of wards who had special education assessment plans developed and who were assessed; (g) the number of wards who had an IEP developed and were placed for services; (h) the number of wards who had an annual special education review; (i) the number of wards given a tri-annual special education review; (j) the number of wards not receiving any needed special education services (with a description of the type of service that was not provided); (k) the total number of special education wards; (l) the number of wards entering CYA who had IEPs;

(m) copies of all corrective action plans for any area out of compliance; and (n) copies of any comments, program updates or personnel changes relating to the monthly special education report. Items (c) through (i) of this report will also indicate the number of wards who received each of the special education activities referred to within the proper timelines.

28. Defendants, no later than the 20th day of the months of January, April, July and October, will provide plaintiffs' counsel with a report setting forth the following information: (a) the total number of wards in custody in each CYA facility as of the end of each month during that quarter; (b) the total number of new wards admitted to a reception facility during each month in the quarter; (c) a description and the number of staff positions at each CYA facility engaged in providing special education evaluations and services. Additionally, defendants on a semi-annual basis will provide plaintiffs' counsel with a report setting forth the total number of wards identified as eligible for special education at CYA broken down for each institution and for each handicapping condition. Defendants' providing plaintiffs' counsel with a copy of the semi-annual report entitled, "The Special Education Pupil Count Report" which CYA is required to submit to the State Department of Education, setting forth the total number of wards identified as eligible for special education at CYA broken down for each institution and for each handicapping condition, will satisfy Subdivision (c) of the above agreement.

29. Defendants will also provide plaintiffs' counsel with

copies of policies and procedures adopted or modified in compliance with this Stipulation. Defendants will also afford plaintiffs' counsel reasonable access to CYA facilities and documents for purposes of ascertaining compliance with this Stipulation.

30. Dr. Robert R. Rutherford and Dr. Kenneth Howell, on behalf of plaintiffs, will evaluate defendants' compliance with this Stipulation. The CYA will reimburse plaintiffs' compliance evaluators for all reasonably incurred costs, including compensation for the time spent in monitoring and evaluating compliance and travel expenses. The total reimbursement for time and expenses of plaintiffs' compliance evaluators shall not exceed $25,000 in any 12-month monitoring period, and compensation for their time shall not exceed $400 per day per person.

31. In the event that either of the two individuals selected to evaluate defendants' compliance with this agreement is unable to fulfill this role, plaintiffs may select a replacement. Any such replacement shall have an advanced degree in special education, be associated with an accredited college or university, shall have experience working with educationally handicapped children, and shall reside in California, Washington, Oregon, or Arizona. Plaintiffs shall submit the name and qualifications of an appropriate replacement to defendants at least 30 days prior to any proposed compliance evaluation. Defendants shall submit any objections that they may have to plaintiffs' selection within 15 days after being so notified. Defendants shall not have the power to reject plaintiffs' selection or to withhold payment of the

monitor's reasonable fees and expenses.

32. Plaintiffs' compliance evaluators will be permitted to make on-site inspections at CYA facilities, review documents, and interview staff, subcontractors, agents, employees, and wards as needed in order to evaluate compliance with this Stipulation, provided that not more than one compliance evaluation in any CYA facility will be conducted in any 12-month calendar period following entry of this Stipulation. Plaintiffs may also select additional special education experts to participate in these compliance evaluations, however, CYA will not reimburse for any costs for any such additional persons.

VII. CONTINUING JURISDICTION AND DISPUTE RESOLUTION

33. Upon final approval by the Court, this Stipulation and any modifications thereto shall be incorporated in a Judgment in the form annexed hereto as Exhibit B.

34. The parties will use all reasonable means to resolve disputes that arise under this agreement prior to seeking the involvement of this Court. In the event that the parties are unable to resolve a dispute informally, plaintiffs' counsel shall notify defendants in writing of the alleged violation of the Stipulation and the remedial action demanded. Defendants shall have 30 days to respond in writing. The defendants' response shall describe the corrective action that will be taken and the timetable for implementation, or shall explain why defendants believe that no remedial action is warranted. The parties will also attempt to meet in good faith to resolve any disputes. Only if the parties are

unable to resolve a dispute through exhaustion of this process shall the matter be submitted to the Court for further orders as may be appropriate.

35. This Stipulation will remain in full force and effect for three years from the date of its entry by this Court.

36. The Court's approval and filing of the Stipulation referred to in paragraph 35 shall not be construed to prevent new litigation on constitutional or federal statutory claims alleged to be in existence following the date of the filing of the Stipulation.

37. Upon agreement of the parties, or upon motion of the plaintiffs and a finding of good cause by the Court, the Stipulation may be extended for additional periods of time to be fixed by this Court from time to time. The failure of the defendants to comply with the obligations set forth in this Stipulation shall be grounds for extending the Stipulation. The jurisdiction of the Court to extend or modify the Stipulation and to enter any order that may be appropriate shall continue until the Stipulation expires.

38. Within twenty days of the filing of the Stipulation with the Court, the defendants shall post copies of this Stipulation in housing and school areas of each CYA facility. Thereafter, staff will make reasonable, good faith efforts to maintain the posting of the Stipulation in those areas for as long as the Stipulation is in effect.

VIII. ATTORNEYS FEES AND EXPENSES

39. Plaintiffs as the prevailing parties, may request from

the Court an award of reasonable attorneys' fees and cost, and defendants reserve the right to contest the amount of any such request.

IT IS SO STIPULATED

Dated: February 7, 1990

Loren M. Warboys

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Dated: February 9, 1990

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Terhune and Tillson

DAN C. DOYLE
CHIEF COUNSEL
STATE OF CALIFORNIA, DEPARTMENT OF THE YOUTH AUTHORITY

IT IS SO ORDERED

Dated: 2/15/90

Charles R Weiner

United States District Judge

EXHIBIT A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

NICK O., by his mother, and Guardian ad Litem, JANE O., on behalf of himself and all others similarly situated, Plaintiff, v. C.A. TERHUNE, in his official capacity as Director of the California Youth Authority; RICHARD TILLSON, in his official capacity as Superintendent of the Northern Reception Center - Clinic, Defendants.	Case No. CIV S-89-0755-RAR-JFM NOTICE OF PROPOSED SETTLEMENT OF CLASS ACTION LAW SUIT AND OPPORTUNITY TO PRESENT OBJECTIONS

Important Notice to all Wards of CYA Institutions:

On May 25, 1989 a lawsuit was filed in federal court against the California Youth Authority. The lawsuit was brought by a youth confined at CYA on behalf of himself and all other youth at CYA in similar situations. The lawsuit claims that CYA fails to identify youth who need special education. It also claims that CYA does not give these youth adequate programs to meet their needs. CYA denied that these claims were true.

On 2/15, 1990 a proposed settlement of this lawsuit was filed with the federal court. The court is going to decide whether this proposed settlement should become a final order of the court. The settlement will not become final until wards at CYA have a chance to object in writing. The purpose of this notice is to summarize the proposed settlement and to explain how residents of CYA may let the court know if they have any objections.

I. Summary of the Settlement

A full copy of the proposed settlement is available at each CYA institution. Generally, the proposed settlement includes the following terms:

1. The settlement applies to all residents (wards) of CYA who are "educationally handicapped" or who are "individuals with exceptional needs". These are legal terms with specific meanings. In general, if you are a resident of CYA and you have a learning disability, a serious emotional problem, a speech or vision problem, a health impairment, a physical or mental handicap, or some other similar problem that hinders your ability to learn, then you are probably part of the group of youth this lawsuit will affect. This group of CYA residents is called a "class" in the settlement. The word "class" will be used in the rest of this notice.

2. CYA agrees that all class members have a right to special education and related services.

3. CYA agrees to promptly identify all wards who may need special education services.

4. CYA agrees to fully assess the educational needs of everyone who is or may be a class member.

5. For all class members, CYA agrees to develop an Individual Education Program (an IEP) that will explain what programs or services the ward needs.

6. CYA agrees to provide each class member with the special education and related services described in the IEP. "Related services" include such things as speech and hearing services, physical and occupational therapy, psychological and counseling services, and other supportive services needed to help class members benefit from special education.

7. CYA agrees that it will hire or contract with as many teachers or other people as needed so that all class members get the special education and related services that they need.

8. CYA agrees to follow all procedural requirements to protect the legal rights of class members and their parents.

9. The settlement sets up a system to make sure that CYA does everything that they agreed to.

10. The settlement will be in effect for three years. It may be extended if CYA does not do what it agreed to.

11. The Court can give the lawyers for the boy who sued CYA attorneys' fees for the work that they did on this lawsuit.

If you have any questions about this settlement you may ask to see a copy of the full settlement at CYA. You may also write or call the attorneys who sued CYA. You should contact: Loren Warboys or Sue Burrell, Youth Law Center, 1663 Mission Street, 5th Floor, San Francisco, CA 94103 (415) 543-3379.

II. How to file objections

Any resident of a CYA institution may file objections to the proposed settlement. Any objections must be in writing. You may mail your objections to the attorneys for the plaintiffs at the following address:

Loren Warboys
Sue Burrell
Youth Law Center
1663 Mission Street, 5th Floor
San Francisco, CA 94103

These objections must be mailed no later than 3/17, 1990. The lawyers for the plaintiffs will collect any such objections and give them to the Court and to the lawyers for CYA. If, for any reason, you do not want CYA to know about all or part of your letter, you must clearly say this in your letter, and your identity will not be revealed to CYA.

The Court will review all objections from residents of CYA. It will then decide whether the proposed settlement should become a final order.

Dated: 2/15, 1990.

Charles R Weiner

United States District Court Judge/~~Magistrate~~

EXHIBIT B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

NICOMEDES SANCHEZ, his mother, and Guardian ad Litem, JANE O., on behalf of himself and all others similarly situated, Plaintiff, vs. C. TERHUNE, in his official capacity as Director of the California Youth Authority; RICHARD TILLSON, in his official capacity as Superintendent of the Northern Reception Center - Clinic, Defendants.	Case No. 89-0755 RAR-JFM JUDGMENT

The Court, having signed the Stipulation and Order for the resolution of the above captioned class-action lawsuit on February 15, 1990; and notice having been given to potential class members, the deadline for objections from class members having expired on March 17, 1990; and the Court having considered the letters from class members; pursuant to the provisions of the previous Stipulation and Order that call for this Court to enter final judgment incorporating the terms of the Stipulation, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Judgment entered on February 15, 1990, is vacated and that Final Judgment is hereby entered in accordance with the terms of the Stipulation and Order approved by the Court on February 15, 1990,

as modified by the Supplemental Stipulation of the parties, which the Court incorporates herein as if set forth in full.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the Court retains jurisdiction to award attorneys' fees and costs to counsel for plaintiffs, and to monitor and enforce the terms of the Stipulation and Order.

Dated: May 7, 1990.

UNITED STATES DISTRICT JUDGE

CORTE DEL DISTRITO DE LOS ESTADOS UNIDOS

DISTRITO ORIENTAL DE CALIFORNIA

NICK O., por su madre, y Custodia ad Litem, Jane O., en nombre de si misma y todos los otros en la misma situación, Demandantes, v. C.A. TERHUNE, en su capacidad oficial como Director de la Autoridad Juvenil de California; RICHARD TILLSON, en su capacidad oficial como Superintendente de la Clínica del Centro de Recepción del Norte, Demandados.	Caso No. CIV S-89-0755-RAR-JFM AVISO DE ACUERDO PROPUESTO DE DEMANDA DE ACCION CLASISTA Y OPORTUNIDAD PARA PRESENTAR OBJECIONES

Aviso Importante para todos los que estén bajo la tutela de las Instituciones de CYA:

El 25 de mayo de 1989 se inició una demanda en la corte federal contra la Autoridad Juvenil de California. La demanda fue iniciada por un joven detenido en CYA por si mismo y todos los otros jovens en CYA en situaciones parecidas. La demanda reclama que CYA se niega a identificar jovenes que necesitan educación especial. También reclama que CYA no ofrece programas adecuados a estos jovenes para realizar sus necesidades. CYA negó la veracidad de estos reclamos.

El _____ de _____ de 1990 un acuerdo propuesto de esta demanda fue iniciado con la corte federal. La corte va a decidir si este acuerdo propuesto debe volverse una orden final de la corte. El acuerdo no se volverá final hasta que los

pupilos en CYA tengan la oportunidad para objectar por escrito. El propósito de este aviso es hacer una resumen del acuerdo propuesto y explicar como residentes de CYA pueden avisar a la corte si tienen algunas objeciones.

1. Resumen del Acuerdo

Una copia completa del acuerdo propuesto está disponible en cada institución. Generalmente, el acuerdo propuesto incluye los términos siguientes:

1. El acuerdo se refiere a todos los residentes (pupilos) de CYA quienes son "incapacitados educacionalmente" o quienes son "individios con necesidades excepcionales." Estos son términos legales con significados específicos. En general, si usted es residente de CYA y tiene una desventaja para aprender, un problema emocional serio, un problema de hablar o de vista, un impedimento de salud, una desventaja física o mental, o algun otro problema parecida que impida su abilidad para aprender, entonces probablemente usted pertenece a este grupo de jovenes que va a ser afectado por esta demanda. Este grupo de residentes de CYA se llama una "clase" en este acuerdo. Se usará la palabra "clase" en el resto de este aviso.

2. CYA está de acuerdo que todos los miembros de la clase tienen derecho a educación especial y servicios relacionados.

3. CYA accede a identificar rápidamente todos los pupilos quienes puedan necesitar servicios educativos especiales.

4. CYA accede a calcular completamente las necesidades de todos los que sean o puedan ser miembros de la clase.

5. Para todos los miembros de la clase, CYA accede a desarrollar un Programa Educativa Individual (un IEP) que explicará que programas o servicios el pupilo necesita.

6. CYA accede a proveer a cada miembro de la clase una educación y servicios relacionados como es descrito en el IEP. "Servicios relacionados" incluye tales cosas como servicios de habla y oido, terapia física y ocupacional, servicios sicológicos y aconsejadores, y otros servicios de apoyo que se necesitan para ayudar a los miembros de la clase a aprovechar la educación especial.

7. CYA accede a emplear o contratar tanto maestros u otras personas como es necesario para que todos los miembros consigan la educación especial y servicios relacionados que necesitan.

8. CYA accede a seguir todos los requesitos para proteger los derechos legales de los miembros de la clase y sus padres.

9. El acuerdo instituye un sistema para asegurar que CYA haga todo lo que han consentido a hacer.

10. El acuerdo estará en efecto por tres años. Puede ser extendido si CYA no hace lo que ha consentido a hacer.

11. La corte puede dar a los abogados del muchacho que demandó la CYA, los pagos legales para el trabajo que han hecho en esta demanda.

Si tiene alguna pregunta acerca de este acuerdo puede pedir ver una copia del acuerdo completo en CYA. Tambien puede escribir o llamar por teléfono a los abogados quienes demandaron la CYA. Deberían contactar: Loren Warboys o Sue Burrell, Youth Law Center, 1663 Mission Street, 5th Floor, San Francisco, CA

94103 (415)543-3379.

II. Como hacer objeción

Cualquier residente de una institución de CYA puede hacer una objeción al acuerdo propuesto. Cualquier objeción tiene que ser por escrito. Puede enviar su objeción a los abogados demandantes a la dirección siguiente:

Loren Warboys
Sue Burrell
Youth Law Center
1663 Mission Street, 5th Floor
San Francisco, CA 94103

Hay que enviar estas objeciones no mas tarde que el _____ de 1990. Los abogados demandantes coleccionarán tales objeciones y las entregarán a la corte y a los abogados de CYA. Si, por cualquier razón, usted no quiere que CYA sepa todo o parte de su carta, tiene que decirlo claramente en su carta.

La corte revisará todas las objeciones de los residentes de CYA. Entonces decidirá si el acuerdo propuesto debe volverse una orden final.

Fecha: _____, 1990.

YOUTH
LAW
CENTER

August 23, 1991

Professor Michael Dale
1480 N.W. 94th Avenue
Plantation, FL 33322

Dear Mike:

Here are the materials I mentioned on the phone today:

(1) the consent decree in our CYA case, Nick O. v Terhune,

(2) California Code of Civil Procedure § 526a, which covers taxpayer standing, and

(3) the en banc decision in Flores v Meese, along with some articles about the decision.

It was great talking to you today. I'll let you know about the Board meeting. Give my best to Nancy and the girls.

Best wishes,

MARK I. SOLER
Executive Director

MS/sm
Encls.

114 Sansome Street, Suite 950 ■ San Francisco, California 94104-3820 ■ 415-543-3379 FAX 415-956-9022

holder's right to vote stock, whether certain other stockholders, who voted by proxy at meeting at which restraining order was allegedly violated, should be purged of contempt charge by reason of their asserted attempt to comply with restraining order in instructions to their proxies was for trial court. Id.

Where injunctive relief against obstruction of right of way was ancillary to suit to quiet title, until merits of case were finally adjudicated, defendants should not, pending appeal, be forced to surrender position which they held prior to commencement of suit, and order adjudging defendants guilty of contempt for violating mandatory injunction pending appeal was annulled. Pomin v. Superior Court in and for El Dorado County (1941) 112 P.2d 17, 44 C.A.2d 206.

Petitioners filing notice of appeal from order of injunction pendente lite thereby transferred to supreme court jurisdiction to determine validity of order relating to contempt. Weber v. Superior Court (1930) 292 P. 650, 109 C.A. 259.

On certiorari to review adjudication of contempt for violation of injunction, regardless of affirmative defenses and questions of fact raised by petitioners, if affidavit of contempt was sufficient and there was sufficient evidence to support its allegations, judgment must be affirmed and petition denied. McFarland v. Superior Court of Merced County (1924) 228 P. 1033, 194 C. 407.

Whether or not defendant violated an injunction was a question for the court on all the evidence in the contempt proceeding, and where the evidence is such that it cannot be said that the trial court abused its discretion in deciding that defendant was not guilty, such decision will not be disturbed. Theodore v. Williams (1919) 185 P. 1014, 44 C.A. 34.

Where beneficiary of injunction brings contempt proceedings against person violating injunction, court's order, dismissing proceedings without grounds being shown for such dismissal, should be annulled on writ of review. Goodall v. Superior Court in and for Santa Barbara County (1918) 174 P. 924, 37 C.A. 723.

That restraining order is too broad is not ground for sustaining certiorari to review order adjudging defendant in contempt for violation of it, no question of jurisdiction being involved. Armstrong v. Superior Court of California, in and for City and County of San Francisco (1916) 159 P. 1176, 173 C. 341.

649. *Punishment for violations*

Punishment of defendant for contempt could be imposed only for violation of injunction rendered in action for dissolution of partnership and not for violation of other duties imposed on him by partnership agreement or by law. Sorensen v. Superior Court of Santa Barbara County (1969) 74 Cal.Rptr. 597, 269 C.A.2d 73, amended in other respects, 80 Cal.Rptr. 481, 276 C.A.2d 131.

Court could order return of contempt fine paid by defendant pursuant to injunction order which was reversed on appeal without making county treasurer, to whom fine had been turned over, a party. Elysium, Inc. v. Superior Court for Los Angeles County (1968) 72 Cal.Rptr. 355, 266 C.A.2d 763.

Where defendant was preliminarily enjoined from utilizing word "Look" as part of title of its magazine "Nude Look", and defendant, pending his appeal, was held in contempt for violations of injunction and paid a fine, and on appeal the injunction order was reversed, defendant was entitled to return of fine. Id.

Where councilmen of municipality were found to be in contempt of court for failure to comply with mandatory injunction, and councilmen subsequently complied, and failure to comply within time limited was result of action of councilmen in pursuing in good faith what they were advised by counsel and believed were legal remedies available to councilmen and to their municipality, trial court abused discretion in refusing to remit punishment of such councilmen on their motion. City of Vernon v. Superior Court of State, in and for Los Angeles County (1953) 250 P.2d 241, 39 C.2d 839, followed 250 P.2d 246, 39 C. 2d 891.

§ 526a. Actions against officers; scope of section; municipal bonds

An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other

person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided, that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities.

An action brought pursuant to this section to enjoin a public improvement project shall take special precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

(Added by Stats.1909, c. 348, p. 578, § 1. Amended by Stats.1911, c. 71, p. 87, § 1; Stats.1967, c. 706, p. 2080, § 1.)

Historical Note

The proviso in the second sentence of the first paragraph was added in 1911.

The second paragraph was added in 1967.

Forms

See West's California Code Forms, Civil Procedure.

Law Review Commentaries

California welfare exemption. (1968) 41 So.Cal.L.Rev. 844.

Constitutionality of California trustee's sale. (1973) 61 C.L.R. 1282.

Legal aspects of the closure and sale of surplus public schools. (1976) 16 Santa Clara L.Rev. 595.

Power of courts to enjoin legislative proceedings. (1925) 14 C.L.R. 37.

Public school financing and equal protection: Serrano v. Priest. (1972) 5 Loyola L.Rev. (Calif.) 162.

Right of taxpayer to maintain action to restrain police chief from expending funds to conduct police surveillance by concealed microphones. (1975) 9 Hast.L.J. 109.

Library References

Injunction ⇐74 et seq.
Municipal Corporations ⇐323, 992 et seq.
C.J.C. Injunctions § 114.
C.J.S. Municipal Corporations §§ 1137, 2139 et seq.
California Pleading, Civil Actions—Chadbourne, Grossman and Van Alstyne, § 579.

Notes of Decisions

Enjoining public officers, boards, and municipalities, see, also, Notes of Decisions under § 526.

1. Validity

The constitutionality of this section could not be raised by one who merely showed that he was a resident, but who did not show that he was not an alien, or that he belonged to the class of persons entitled to sue. Thomas v. Joplin (1910) 112 P. 729, 14 C.A. 662.

2. Construction and application

Under Pol.C. § 51 (repealed; see Gov. C. § 241), defining citizens as persons born in the state and residing within it, and all persons born out of the state who are citizens of the United States and residing within the state, one suing to restrain an illegal payment of county funds, who described himself as a "resident" of the county, did not show that he was entitled to sue, within this section, since the words "resident" and "citizen" are not synonymous. Thomas v. Joplin (1910) 112 P. 729, 14 C.A. 662.

3. Purpose of section

Purpose of this section in providing that an action to prevent any illegal expenditure of funds of a county or city may be maintained against any officer thereof either by citizen-residents or a corporation which has paid a tax therein is to enable a citizen-resident taxpayer to question public expenditures of local governments that might otherwise pass unchallenged. Bledsoe v. Watson (1973) 106 Cal.Rptr. 197, 30 C.A.3d 105.

The primary purpose of this section is to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirements; this section is liberally construed to achieve this remedial purpose. Blair v. Pitchess (1971) 96 Cal.Rptr. 42, 486 P.2d 1242, 5 C.3d 258, 45 A.L.R.3d 1206.

4. Right to injunction in general

In order to obtain injunctive relief in actions brought under this section allowing a taxpayer's action to enjoin the illegal use of public funds taxpayer must establish that the expenditure of public funds which he is seeking to enjoin is illegal. Los Angeles County v. Superior Court for Los Angeles County (1967) 62 Cal.Rptr. 435, 253 C.A.2d 670.

It would be violative of equal protection clause of Fourteenth Amendment to give nonresident corporate taxpayer right to maintain suit to enjoin illegal expenditure of municipal funds while denying same right to nonresident taxpayer who was natural person. Irwin v. City of Manhattan Beach (1966) 51 Cal.Rptr. 881, 415 P.2d 769, 65 C.2d 13.

5. Nature and scope of relief

Seeking relief in personam and seeking relief in rem as well are not mutually exclusive remedies. Card v. Community Redevelopment Agency of South Pasadena (1976) 131 Cal.Rptr. 153, 61 C.A.3d 570.

Injunction by trial court will not be disturbed where issuance of injunction grows

out of factual situation. Genser v. McElvy (1969) 82 Cal.Rptr. 521, 276 C.A.2d 709.

The courts will entertain only those taxpayer suits that seek to measure governmental performance against a legal standard; the courts cannot formulate decrees that involve the exercise of indefinable discretion, nor will the courts invalidate a transaction which is for municipal purposes even though there is incidental private benefit. Rathbun v. Salinas (1973) 106 Cal.Rptr. 154, 30 C.A.3d 199.

Equity may enjoin municipal corporation's act exceeding jurisdiction, but not legislative or governmental acts within scope of authority. Muchenberger v. City of Santa Monica (1929) 275 P. 803, 206 C. 635.

Where, under ordinances accepting gift to erect buildings in city park, part of property of city was to be used in erection, plaintiffs, citizens, taxpayers, and members of board of park commissioners could enjoin defendant commissioners appointed under such ordinance to supervise erection and maintenance from carrying out provisions of ordinances, and from interfering with duties of plaintiffs as park commissioners. O'Melveney v. Griffith (1918) 171 P. 934, 178 C. 1.

Where a plaintiff, in a suit brought in behalf of a municipal corporation, is a taxpayer, and has a direct and substantial interest in the controversy, the fact that he may also have ulterior motives in bringing the suit does not disqualify him. Mock v. City of Santa Rosa (1899) 58 P. 826, 126 C. 330.

Representatives of municipal corporations as trustees of corporation's property whether acquired by taxation or otherwise, come peculiarly within province of court of equity. Smith v. City of Sacramento (1857) 1 Lab. 342.

Individual taxpayer can complain separately of injury common to him and all other taxpayers living under one municipal government. Id.

6. Grounds of relief in general

Resident taxpayer under appropriate circumstances may maintain action against officer where there has been an illegal expenditure, waste or injury to public funds. Malone v. Superior Court, in and for City and County of San Francisco (1953) 254 P.2d 517, 40 C.2d 546.

Organization of Spanish War veterans using veterans' memorial building erected under Pol.C. § 4041f, subds. b, d, as amended by Stats.1927, p. 207, § 1, was not entitled to injunction against supervisors to prohibit use of building or rooms therein by other organizations than those composed of veterans, where there was no showing of any illegal expenditure of money or waste or injury to property under this section, or that plaintiff had status of citizen or taxpayer, or that incidental use of building by other organizations interfered with use thereof by veterans' organizations. Captain Charles v. Gridley Camp, No. 104, United Spanish War Veterans v. Board of Sup'rs of Butte County (1929) 277 P. 500, 98 C.A. 585.

Order of the county board of supervisors granting railroad right to construct a double track upon a public bridge was not shown to be invalid or that the board abused its discretion so as to authorize a granting of an injunction by a taxpayer. Meetz v. County of Alameda (1880) 6 P. C.L.J. 290.

7. Court policy

In view of fact that validity of challenged court policy with respect to petitions to proceed in propria persona is a potential issue in every criminal case in which a defendant elects to represent himself and in view of fact that such a defendant not only has standing but is already before court and has open to him immediate and plenary recourse within judicial system with respect to any claimed violation of his constitutional rights, court policy could not be challenged by way of taxpayer's action. Di Suvero v. Los Angeles County (1977) 140 Cal.Rptr. 895, 73 C.A.3d 718.

Even though county was source of funds for operation of superior court, it was court and not county that was responsible for court policy with respect to petitions to proceed in propria persona and use of funds in implementation of such policy, so that taxpayer's action against county could not constitutionally be used as means of challenging court policy when court policy could not be challenged directly in a taxpayer's action. Id.

8. Interference with contracts

Citizen-resident taxpayers and their attorney could not be held liable for damages for wrongful interference with a contract a city official had entered into with an attorney for merely writing to the city official to persuade him not to make an expenditure of funds which they thought might be illegal, this section providing for an action challenging such expenditure by citizen-resident taxpayers providing a complete defense to damage action. Bledsoe v. Watson (1973) 106 Cal.Rptr. 197, 30 C.A.3d 105.

Conduct of citizen-resident taxpayers of a municipality and of their attorney, in communicating with a public officer to prevent his asserted illegal expenditure of public funds was justifiable under general right of a citizen to protest a public expenditure by petition and instruction, and citizen-residents and their attorney could not be found liable in damages for exercising such right on theory it amounted to wrongfully inducing breach of contract. Id.

9. Community redevelopment

Expectation of economic improvement and prospect of speculative gains by themselves furnish insufficient basis for use of powers of redevelopment under community redevelopment law. Regus v. City of Baldwin Park (1977) 139 Cal. Rptr. 196, 70 C.A.3d 968.

Without evidence of blight there is no justification for community redevelopment, since it compels taxpayers in one section of community to subsidize cost of development of another section by carrying disproportionate share of cost of local government and since unrestricted redevelopment fosters speculative competition between municipalities in their attempts to attract private enterprise, speculation which they can finance in part with other people's money. Id.

10. Illegal or unauthorized acts—In general

For a city to give assistance to an individual or to a private corporation, even by an outright subsidy, might be advantageous to the city itself, particularly in encouraging a respected banking institution to construct an attractive building, but because of reasons of public policy, direct assistance, as distinguished from that which is incidental to exercise of city's governmental functions, cannot be sustained. Rathbun v. Salinas (1973) 106 Cal.Rptr. 154, 30 C.A.3d 199.

Where petitioners filed petition for writ of mandate against state architect, seeking order compelling him to revoke change order which permitted substitution of plastic pipe for metal pipe in certain facets of construction of high school on July 3, plastic pipe had been installed and encased in walls and floors by July 20, and school district was not joined as indispensable party until August 8, proceeding had become moot, notwithstanding contention that portion of plastic pipe installation cost, which had not been paid, could be retained if architect were required to revoke order. Gensen v. McElvy (1969) 82 Cal.Rptr. 420, 276 A.C.A. 857.

If city proposed to install permanent sewer lines in adjoining disputed unincorporated territory, not in a good faith attempt to serve residents but to thwart local area formation commission and defeat annexation by another city, this would not only constitute waste but would be an illegal expenditure which can also be enjoined by a citizen resident. City of Ceres v. City of Modesto (1969) 79 Cal.Rptr. 168, 274 C.A.2d 545.

Where deed conveyed strip of land to city exclusively for street purposes and reserved to grantor owning property on both sides of strip right to use land for any public utility, and city council accepted deed by resolution stating that land was received for street purposes, city taxpayer was entitled to restrain city and its lessee from drilling for oil on such land which had been used as a street for many years. Marshall v. Standard Oil Co. of California (1936) 61 P.2d 520, 17 C.A.2d 19.

In action against officers to recover the salaries paid to them where both the auditor and treasurer of the city who were disbursing officers were members of the appointing council fact that the auditor drew his warrant for salary did not divest him of knowledge which as councilman he possessed as to the ineligibility of the officers to appointments given them by the council. Briare v. Matthews (1929) 2 Rag. 64.

Transfer of moneys in treasury from one special fund to another by city's council will be restrained by injunction. Smith v. City of Sacramento (1857) 1 Lab. 70.

11. —— Appropriations, illegal or unauthorized acts

An injunction will issue against the fraudulent or unlawful appropriation of public moneys. Andrews v. Pratt (1872) 44 C. 309; Foster v. Coleman (1858) 10 C. 278.

If an appropriation is made illegally or for an unlawful purpose by county board of supervisors, any taxpayer can maintain action for recovery into county treasury of public funds so expended, after making demand on proper public officials to commence action, unless it be made to appear that demand would be unavailing. Citizens' Committee for Old Age Pensions v. Board of Sup'rs of Los Angeles County (1949) 205 P.2d 761, 91 C.A.2d 658.

12. —— Contracts, illegal or unauthorized acts

Where void contracts with county had expired and had been completely performed in all respects by the parties and

county board would have had general power to execute them and in fact appropriated funds with which to pay and permit fulfillment of the agreements, and patent injustice and hardship would result to suppliers if they were forced to return 3.4 million dollars collected on contracts which were void only because executed by purchasing agent rather than county board, it was matter for trial judge, sitting as chancellor in equity, whether county would be estopped to seek restitution. Advance Medical Diagnostic Laboratories v. Los Angeles County (1976) 129 Cal. Rptr. 723, 58 C.A.3d 263.

A taxpayer's complaint alleging that San Francisco redevelopment agency and its executive director and commissioners disposed of public property at a price far below the "fair value" requirement, and contrary to public hearing requirements of Health & S.C. § 33431 and federal statutes and hence were ultra vires stated cause of action under this section authorizing actions by resident taxpayer against officers of a county, town, city, or city and county to restrain illegal expenditure of public funds since state officials may be sued under such statute. Duskin v. San Francisco Redevelopment Agency (1973) 107 Cal.Rptr. 667, 31 C.A.3d 769.

Where contracts had already been executed by city they could not be enjoined in taxpayer's action. Hodgeman v. City of San Diego (1942) 128 P.2d 412, 53 C.A.2d 610.

In taxpayer's suit to enjoin execution of contracts for installation of parking meters or to enjoin their performance, injunction would be denied where contracts had been executed and installed and meters would soon be paid for out of earnings. Id.

A taxpayer may maintain an action to restrain a city from carrying out an ultra vires contract between the city and county, wherein the county unlawfully agreed to furnish cement to the city. Riverside Portland Cement Co. v. City of Los Angeles (1918) 174 P. 31, 178 C. 609.

A taxpayer interested in an unsuccessful bidder for contract for public improvement, whose bid was lowest, suing to enjoin award to a higher bidder, could not claim that, because the specifications did not provide for comparison of devices to be offered, the council had no authority to investigate their merits in awarding the contract, where such unsuccessful bidder co-operated with the counsel in making such comparisons. West v. City of Oakland (1916) 159 P. 202, 30 C.A. 556.

Where the acceptance by a county board of supervisors of the higher of two bids for the furnishings of a building is tainted with fraud or favoritism, relief by injunction against use of public money may be had, but, in the absence of such fraud, the discretion of the board in making the purchase will not be disturbed. People ex rel. Merrill v. Nellis (1910) 111 P. 631, 14 C.A. 250.

Injunction would not issue to restrain the board of supervisors of San Francisco from letting a contract in direct contravention of the charter, since the court was bound to presume that the board would do its duty, and there was no irreparable injury in any event, since a contract let in violation of the charter would be void. Barto v. Board of Sup'rs of City and County of San Francisco (1902) 67 P. 758, 135 C. 494.

A taxpayer of a city can sue to enjoin the execution of an illegal contract by the city with a bank for the deposit with it of the public moneys. Yarnell v. City of Los Angeles (1891) 25 P. 767, 87 C. 603.

An injunction would not be granted to restrain a board of supervisors from incurring liabilities which would not be a legal charge against the county, since such act could not in any way injure plaintiff as a taxpayer. Linden v. Case (1873) 46 C. 171.

Where city council attempted to contract under a void contract so that any payment made pursuant thereto would likewise be void, taxpayer could maintain an action to restrain such illegal expenditure. Casper v. City of Los Angeles (1929) 2 Rag. 30.

Where contract for materials for completion of city hall building was void because of ultra vires requirement inserted by board of commissioners in its advertisements for bids, board would be enjoined, in suit by taxpayer, from paying out money pursuant to contract terms. Mulrein v. Kalloch (1882) 9 P.C.L.J. 476.

13. —— Expenditures generally, illegal or unauthorized acts

Under this section it is immaterial that amount of illegal expenditure is small or that illegal procedures actually permit saving of tax funds. Wirin v. Parker (1957) 313 P.2d 844, 48 C.2d 890.

Where a city council failed to declare void certain transactions with a special attorney whose services it had engaged by contract, and showed a willingness to compensate him after being informed of his violations of the city charter and his derelictions of duty, a city taxpayer had the capacity to maintain an action to enjoin disbursements of city funds to such

attorney. Terry v. Bender (1956) 300 P. 2d 119, 143 C.A.2d 198.

Resident taxpayers of city were entitled to sue to enjoin alleged illegal expenditures of municipal funds in the enforcement of city ordinance providing for surrender of unclaimed impounded animals for purposes of medical research. Simpson v. City of Los Angeles (1953) 253 P. 2d 464, 40 C.2d 271, appeal dismissed 74 S.Ct. 37, 346 U.S. 802, 98 L.Ed. 333, rehearing denied 74 S.Ct. 118, 346 U.S. 880, 98 L.Ed. 387.

If a city council and county board of supervisors may determine what improvements are calculated to advance the public interest, subject to interference by the courts only when it is plainly apparent that such improvements are not so calculated, it must necessarily be true that they may determine what price should be paid for the improvements, subject to no greater right in the courts to interfere. Los Angeles County v. Dodge (1921) 197 P. 403, 51 C.A. 492.

Expenditure by city and county of Los Angeles of $950,000, one half from each, in payment for a stadium on land of an agricultural association leased by it to the city, and by the city and county to a development association, ownership of the building to vest finally in the agricultural association, possession in the city and county was not so great a price on the part of the county for the public benefits to it as to subject the transaction to the interference of the courts. Id.

It being presumed that a city council acted in good faith, its action in purchasing land for a fire-engine house is not subject to attack by a city officer or taxpayer on the ground that there was no intention ever to erect such a building on the site purchased. City of Santa Barbara v. Davis (1904) 76 P. 495, 142 C. 669.

Taxpayer could maintain a suit to enjoin the drawing of a warrant for the price of land purchased under County Government Act, § 25, subd. 8, without the publication of prescribed notice. Winn v. Shaw (1891) 25 P. 968, 87 C. 631.

To warrant the granting of an injunction restraining the drawing of a warrant on a county treasurer to pay for land bought by the county in violation of the county government act, it was not necessary that it be alleged or shown that the county or plaintiff would be damaged if the purchase was completed or that the value of the land was less than the price to be paid. Id.

An injunction would not be granted at the suit of a taxpayer to restrain the county auditor from issuing a warrant for the payment of an alleged illegal claim allowed against the county by the board of supervisors, as the county might compel the auditor to refund the money in an action at law if the warrant was in fact illegally issued. Winn v. Shaw (Sup.1891) 25 P. 244.

An injunction to restrain the anticipated action of the board of supervisors of a county, in paying certain alleged illegal claims, would not be granted, it being hardly claimed that there was an excess of jurisdiction on the part of the board. Merriam v. Board of Yuba County Sup'rs (1887) 14 P. 137, 72 C. 517.

A court of equity, on the complaint of a taxpayer, would enjoin the payment of and cancel county warrants illegally drawn on the treasurer by order of the board of supervisors. Andrews v. Pratt (1872) 44 C. 309.

Where police officers were illegally appointed and they performed their duties at a time when no action was pending to contest their title to their positions, taxpayer could maintain an action to recover moneys paid out to such officers as salaries. Briare v. Matthews (1929) 2 Rag. 64.

14. —— Expenditures under invalid law or ordinance, illegal or unauthorized acts

Taxpayer's interest in expenditure of public funds and method of raising those funds established her standing to seek both equitable and legal relief against city's allegedly wrongful disposition of vacated city streets by selling streets for 50% of their unencumbered fee value. Harman v. City and County of San Francisco (1972) 101 Cal.Rptr. 880, 496 P.2d 1248, 7 C.3d 150.

Under this section authorizing actions by resident taxpayer against officers of a county, town, city, or city and county to obtain an injunction restraining and preventing illegal expenditure of public funds, if county, town or city officials implement a state statute or even provisions of state constitution an injunction will issue to restrain such enforcement if provision is unconstitutional. Blair v. Pitchess (1971) 96 Cal.Rptr. 42, 486 P.2d 1242, 5 C.3d 258, 45 A.L.R.3d 1206.

Under this section authorizing actions by resident taxpayer against officers of county, town, city, or city and county to obtain injunction restraining and preventing illegal expenditure of public funds,

residents and taxpayers of county of Los Angeles had standing to bring action to enjoin county and its sheriff, marshal and deputy sheriff, and justice court constable from executing provisions of claim and delivery law on ground of unconstitutionality of law and that, by expending time of county officials in executing its provisions, defendants were illegally expending county funds. Id.

Taxpayer who alleged that public money had been appropriated and would continue to be appropriated and spent in the future to establish a system for enforcement of loitering and housing ordinances of city could maintain action to have ordinances declared void even though ordinances were penal in nature. Ames v. City of Hermosa Beach (1971) 93 Cal.Rptr. 786, 16 C.A.3d 146.

In absence of proof by affidavits or otherwise that there was any urgency requiring temporary relief while taxpayer's action challenging loitering and housing ordinances was pending, taxpayer was not entitled to a preliminary injunction. Id.

Where ways were open for resolution of problem of probable insufficiency of funds for payment of fire department salaries according to salary schedule adopted by council and total expenditure of money for salaries of firemen was limited to amount set forth in budget as adopted until taking of such appropriate action, there was no illegal expenditure of funds of the city and no basis for judicial intervention at behest of taxpayer. Silver v. City of Los Angeles (1967) 65 Cal.Rptr. 227, 257 C.A.2d 557.

15. —— Expenditures for corrupt or illegal purposes, illegal or unauthorized acts

In taxpayer's action to restrain police chief from expending funds to conduct police surveillance by means of concealed microphones, since trial court found that such surveillance was conducted in places of occupancy without consent, since such violated constitution and since injunction restraining expenditure to defray entry upon private premises without consent for purpose of secreting microphones could be easily obeyed, court erred in entering judgment for police chief and if he wished to show that there was no threat of future illegal expenditures, plaintiff was to be entitled to meet issue. Wirin v. Parker (1957) 313 P.2d 844, 48 C.2d 890.

A municipality whose funds are about to be expended pursuant to a corrupt agreement to inject the personal influence of a public officer in the procurement of action by the governmental body may be enjoined in an action brought by a taxpayer. Terry v. Bender (1956) 300 P.2d 119, 143 C.A.2d 198.

An action to obtain a judgment restraining and preventing illegal expenditure or waste of funds of a city may be maintained against any officer, agent, or other person acting in its behalf by a citizen resident therein who has within one year before the commencement of the action paid a tax to the city. Wirin v. Horrall (1948) 193 P.2d 470, 85 C.A.2d 497.

Citizen resident of city who had paid a tax to city within one year prior to filing of complaint could maintain an action against police officers to restrain officers from expending funds of city in blocking off areas of city and conducting illegal searches and seizures by searching all persons and automobiles entering or leaving such area without a search warrant and without reasonable cause to believe that searched citizens had violated any law or that searched automobiles contained contraband. Id.

Allowance of exorbitant sums for appraisal of taxable property was constructive fraud, for which taxpayer had ample remedy. Storke v. City of Santa Barbara (1926) 244 P. 158, 76 C.A. 40.

If a contract between the city and county of San Francisco and a construction company for the construction of an aqueduct was illegal, taxpayers had a right to prevent such illegal expenditure under the contract, legally constituting a loss to the city, though injunction might result in the abandonment of the whole project and consequent business losses. Crowe v. Boyle (1920) 193 P. 111, 184 C. 117.

16. —— Expenditures wasting public funds, illegal or unauthorized acts

City's proposed plan to construct permanent sewer lines in area which it might never be able to annex would constitute an unconscionable waste of city's tax funds and it might entitle taxpayer to injunctive relief. City of Ceres v. City of Modesto (1969) 79 Cal.Rptr. 168, 274 C.A.2d 545.

Where municipal taxpayers alleged, in petition for mandamus and certiorari to review proceedings in which a subdivision map was approved and property described therein was annexed, that city, if not ordered to desist, would expend municipal funds for public improvements and other purposes in the area and thereby waste funds of the city, but no facts were alleged to support such general charge, taxpayers failed to make a showing sufficient to maintain a representative suit under

this section, authorizing suits by resident taxpayers to restrain or prevent any illegal expenditure of property of a city or county. Wine v. Council of City of Los Angeles (1960) 2 Cal.Rptr. 94, 177 C.A.2d 157.

The mere fact that a method of paying for municipal work which is contrary to the statute might be expensive and wasteful, and might preclude responsible contractors from securing it, gives a citizen of the municipality a sufficient standing to maintain an action for an injunction to prevent the illegal expenditure. Clouse v. City of San Diego (1911) 114 P. 573, 159 C. 434.

Mere fact that unlawful method of payment might be expensive and wasteful, gives citizen standing to maintain action for injunction. Id.

17. —— Indebtedness, incurring for illegal or unauthorized purposes

Where advancement of funds by citizens' committee to defray expenses of municipal officials in making trip to present municipality's position on particular matter to Congress was not intended to promote individual interests of committeemen or influence delegation and municipality was not prejudiced, circumstance that officials were not personally out of pocket was not a reason for enjoining disbursement of public funds to repay advances. Powell v. City and County of San Francisco (1944) 144 P.2d 617, 62 C.A.2d 291.

Where a claim against the county has been allowed in full by the board of supervisors, if within the jurisdiction of the tribunal, it can be attacked only by a suit in equity on the ground of fraud. Thiel Detective Co. v. Tuolumne County (1918) 173 P. 1120, 37 C.A. 423.

Injunction will lie, at suit of a taxpayer, to restrain a county from incurring expense for equipping a ferry partly without the county, it having no authority to establish or operate such a one. Johnston v. Sacramento County (1902) 69 P. 962, 137 C. 204.

The county board of supervisors was authorized to pass on claims against the county and in doing so acted in a judicial capacity, and injunction would not lie at the instance of a taxpayer to prevent the allowance of a claim, or its payment when allowed. McBride v. Newlin (1900) 61 P. 577, 129 C. 36.

In a proper case, where it is shown that the municipal officers are about to create an illegal indebtedness against the corporation, and to levy and collect a tax for the payment thereof, such acts may be restrained at the suit of a taxpayer. Bradford v. City and County of San Francisco (1896) 44 P. 912, 112 C. 537.

18. —— Misapplication of funds, illegal or unauthorized acts

In California, taxpayer of city may enjoin misapplication of city's funds, before illegal expenditure thereof, or may sue the officers guilty of misapplication to recover such sums on behalf of municipality but cannot sue city for such misapplication. Fox v. City of Pasadena (C.C.A.1935) 78 F.2d 948.

Action to obtain judgment restraining and preventing any illegal expenditure of funds of city may be maintained against officer, agent, or other person acting in its behalf by any citizen residing therein who has within one year before the commencement of action paid taxes to such city. Trickey v. City of Long Beach (1951) 226 P.2d 694, 101 C.A.2d 871.

A taxpayer showing that San Francisco ordinances purporting to create three new positions of police captains were void could maintain action to restrain payment of salaries attached to such offices under this section. Brown v. Boyd (1939) 91 P.2d 926, 33 C.A.2d 416.

Allowing a warrant based on claim for detective services which wholly failed to comply with municipal requirements was void. Chapman v. City of Fullerton (1928) 265 P. 1035, 90 C.A. 463.

Action to enjoin payment of void warrant for services in detection of liquor law violators were properly maintained by taxpayer and resident within city. Id.

Illegal expenditure of public funds may be enjoined or recovered, though taxpayer cannot show special damage. Mines v. Del Valle (1927) 257 P. 530, 201 C. 273.

A taxpayer of a city could not maintain action to enjoin payments under a contract for construction work based on the mere informality of the bond in that there was only one surety where two were required by the charter, in the absence of showing of injury either to the public or the taxpayer. Crowe v. Boyle (1920) 193 P. 111, 184 C. 117.

19. —— Election upon illegal or inoperative measure, illegal or unauthorized acts

Where it is proposed to hold an election for submission of a measure to popular vote and that measure will be wholly void even if adopted, courts may, at instance of resident taxpayer, enjoin holding of election on ground that it will be a useless expenditure and waste of public funds.

Note 19

Holman v. Santa Cruz County (1949) 205 P.2d 767, 91 C.A.2d 502.

Where plan of building dam and raising funds therefor adopted by fire district commissioners was illegal, election within district in an attempt to approve the illegal and inoperative project would be enjoined at instance of resident taxpayers. Id.

In view of this section, where it was proposed to hold election for submission of measure to popular vote, which would be inoperative if adopted, court might, in suit by resident taxpayer, enjoin election because it would be useless expenditure and waste of public money. Harnett v. Sacramento County (1925) 235 P. 445, 195 C. 676.

20. —— Issuance or delivery of bonds, illegal or unauthorized acts

In a suit to enjoin a city treasurer from issuing bonds, where the trial court denied an injunction and refused a temporary restraining order pending appeal, the appeal would be dismissed; it being presumed that the city treasurer had issued the bonds as required by Stats.1911, p. 1202, § 4, and the complaint alleging that he would do so unless enjoined. Bernard v. Weaber (1913) 138 P. 941, 23 C.A. 532.

An appeal from a judgment denying an injunction to restrain a city treasurer from issuing bonds would be dismissed where the bonds were issued pending the appeal. Id.

A taxpayer was a sufficiently interested party to maintain an action to contest the official declaration of the result of an election to determine the issuance of bonds. Gibson v. Board of Sup'rs of Trinity County (1889) 22 P. 225, 80 C. 359.

Injunction would be granted at suit of any taxpayer to restrain issuance of street improvement bonds authorized by unconstitutional act. Schumacker v. Toberman (1880) 56 C. 508, 6 P.C.L.J. 997.

Bonds of a municipal corporation that were void in the hands of an innocent holder were not a charge against the public, and their circulation would not be enjoined at the suit of a taxpayer. McCoy v. Briant (1878) 53 C. 247, 2 C.Leg.Rec. 52, 2 P.C.L.J. 213.

21. —— Tax exemptions, illegal or unauthorized acts

Resident taxpayer of county had right to bring suit against county to challenge the legality of a tax exemption. Lundberg v. Alameda County (1956) 298 P.2d 1, 46 C.2d 644, appeal dismissed 77 S.Ct. 224, 352 U.S. 921, 1 L.Ed.2d 157.

22. —— Waste or other injury to property, illegal or unauthorized acts

The possible interference with recreational uses of park property for duration of emergency as result of use of the park property for temporary housing purposes to help meet the emergency housing shortage caused by necessities of war having retarded construction of sufficient housing would be too inconsequential to justify interference therewith by the courts by issuance of an injunction upon a taxpayer's application. Griffith v. City of Los Angeles (1947) 178 P.2d 793, 78 C.A.2d 796.

City will not be restrained from using property purchased for waterworks for location of hospital. Jardine v. City of Pasadena (1926) 248 P. 225, 199 C. 64, 48 A.L.R. 509.

23. Actions—In general

Nonprofit corporation alleged to be assignee of causes of action of certain named county taxpayers, which brought action against county and county tax assessor, alleging generally that county was wasting money because it was not collecting all that it could in revenues, failed to state cause of action for relief under provision of this section authorizing action by taxpayer against county officers to restrain and prevent waste of county funds. Trim, Inc. v. Monterey County (1978) 150 Cal.Rptr. 351, 86 C.A.3d 539.

Taxpayer's demand that city institute proceedings to recover salaries illegally paid should be made upon council, not city attorney. Briare v. Mathews (1927) 258 P. 939, 202 C. 1.

Taxpayer's demand upon council to institute proceedings was not prerequisite, where useless. Id.

Where a demand that municipal officers sue for funds illegally expended would clearly be unavailing, such demand is not a condition precedent to a taxpayer's right to sue on behalf of the city. Osburn v. Stone (1915) 150 P. 367, 170 C. 480.

In an action by a taxpayer to set aside a contract made by a city, and to have returned to it certain bonds, where the complaint shows that a demand upon the city to bring suit or demand the return of the bonds would have been useless, the omission to make such demands is not ground for reversal of judgment for plaintiff. Mock v. City of Santa Rosa (1899) 58 P. 826, 126 C. 330.

Since § 21 of the charter of Santa Rosa, Stats.1875–76, p. 262, prescribing the duties of the city attorney, and stating when he may commence actions on his own motion, does not authorize him to bring suit against the city to set aside a contract for the construction of waterworks, it is not necessary for a taxpayer before bringing such a suit to obtain the city attorney's consent. Id.

The legal action available to citizen or taxpayer to prevent improper use of legislative committee funds is through state controller, who has duty to audit all claims against state, by making complaint of improper use to which funds are put. 22 Ops.Atty.Gen. 93.

24. —— Suing or defending on behalf of municipality, actions

Where district attorney with adequate knowledge of illegal expenditure of county funds by county officers refuses to institute action to recover money, citizen taxpayer may institute such action in name of county for benefit of county, but cannot maintain suit in name of any one other than county and cannot properly join county as party defendant. Gray v. White (1935) 43 P.2d 318, 5 C.A.2d 463.

An action cannot be maintained by a citizen to set aside a judgment against a city, quieting the title of a claimant to land alleged to have been dedicated to the public for street purposes, which judgment was rendered in pursuance of an agreement with the city authorities by which the city acquired other property in consideration of its making default; there being no offer to restore such property, and no allegation that the use of the alleged street by the public has been interfered with. Dunn v. Long Beach Land & Water Co. (1896) 46 P. 607, 114 C. 605.

A citizen and taxpayer of a city cannot maintain an action in behalf of the city against third persons unless the bringing of such action is a duty devolving on the authorities of the city, as to which they have no discretion, and which they have refused to perform. Id.

A bill to have declared void a contract by the supervisors of a county should be brought in the name of the county as a corporation, and not by the people of the county. People of Stanislaus County ex rel. Smith v. Myers (1860) 15 C. 33.

25. Pleadings—In general

In suit by the state to enjoin the wastage of natural gas under Pub.Res.C. §§ 3310, 3312, where neither the Public Resources Code nor the injunction provisions of C.C.P. § 525 et seq. to which it referred expressly prohibited the use of a cross-complaint, cross-complaint by operator against other operators in such proceeding was authorized. Tide Water Associated Oil Co. v. Superior Court of Los Angeles County (1955) 279 P.2d 35, 43 C.2d 815.

A pending suit by a nonresident taxpayer, in behalf of himself and all other nonresident taxpayers to annul a contract made by a city, may be pleaded in abatement of a suit for the same purpose afterwards brought in the same court by other nonresident taxpayers. Gamble v. City of San Diego (C.C.1897) 79 F. 487.

Taxpayer's suit to enforce trust for erection of buildings in park could not be maintained in absence of allegation of fraud, collusion, ultra vires, or failure to perform duties specifically enjoined upon board of park commissioners, since board has exclusive right to deal for city with reference to park affairs. Pratt v. Security Trust & Savings Bank (1936) 59 P.2d 862, 15 C.A.2d 630.

In city residents' action to enforce trust for erection of buildings in city park, allegation that attorney general and park commissioners neglected and refused to proceed against trustee, or require an accounting for its alleged breach of trust, was not allegation of knowledge of trustee's breach of trust or of nonaction on part of attorney general and park commissioners so as to authorize suit to enforce trust by residents rather than by attorney general or park commissioners. Id.

Taxpayer's complaint to compel municipal officers to repay funds illegally expended was not required to show plaintiff to be resident of city. Mines v. Del Valle (1927) 257 P. 530, 201 C. 273.

Cross-complaint, in a taxpayer's suit to annul an order of a town board of trustees declaring that a franchise ordinance had been rejected was demurrable as seeking relief foreign to the subject-matter of the suit. Reed v. Wing (1914) 144 P. 964, 168 C. 706.

A petition to enjoin a board of county supervisors from allowing, and the treasurer from paying, a certain claim, was fatally defective, where it did not allege that such bill had been made out or filed, or that it would be presented. McBride v. Newlin (1900) 61 P. 577, 129 C. 36.

In taxpayer's action to recover salaries paid to patrolmen, defendants had burden to answer to merits of the charges contained in the complaint unless they wish to admit them and having answered it, they had the burden to offer some evi-

dence in support of the answer. Briare v. Matthews (1929) 2 Rag. 64.

26. —— Sufficiency of pleadings

Taxpayers stated statutory cause of action for waste on basis that school district's consolidation plan would cost a great deal more than alternative plans considered, without finding of any additional public benefit. Los Altos Property Owners Ass'n v. Hutcheon (1977) 137 Cal.Rptr. 775, 69 C.A.3d 22.

A taxpayer's amended complaint stating that bank building to be constructed on public parking lot would not serve any useful purpose of city for at least 50 years, that property to be leased had been used for 15 years and was still being used for public parking, that although the building would belong to city at end of 50 years it was not the proper function of city to invest in bank buildings, that transaction had some aspects of a sale which would require public bidding, that lessee would avoid tax on land upon which building rested, that at the end of 50 years lessee had first refusal against another lessee, and that reasonable ground rental for 50-year lease was a sum greatly in excess of that agreed to stated cause of action. Rathbun v. Salinas (1973) 106 Cal.Rptr. 154, 30 C.A.3d 199.

Taxpayer's allegation that by selling vacated streets for 50% of their unencumbered fee value city had violated charter provisions delineating the city's duties in its appraisal and disposition of vacated streets presented a justiciable complaint. Harman v. City and County of San Francisco (1972) 101 Cal.Rptr. 880, 496 P.2d 1248, 7 C.3d 150.

Nonresident taxpayer's complaint to enjoin construction, maintenance and use of pedestrian street overpass was insufficient for failure to allege misconduct on part of city in authorizing construction of overpass by private parties at their own expense and subject to strict municipal control as to design, maintenance and future use. Irwin v. City of Manhattan Beach (1966) 51 Cal.Rptr. 881, 415 P.2d 769, 65 C.2d 13.

Demurrer to third cause of action in taxpayer's suit to enjoin city from executing or performing contracts for installation of parking meters was properly sustained where no facts were alleged showing fraud but only innuendos and legal conclusions were relied on by plaintiff. Hodgeman v. City of San Diego (1942) 128 P.2d 412, 53 C.A.2d 610.

Complaint, in suit to restrain city from issuing improvement bonds, was insufficient, in absence of allegation that plaintiffs made objections to city council as required by statutes. Sturgeon v. City of Hawthorne (1930) 289 P. 229, 106 C.A. 352.

Taxpayer's complaint to recover expenses of city officials in attempt to secure approval of unlawful contract did not state cause of action. O'Connell v. City and County of San Francisco (1928) 284 P. 655, 204 C. 1.

The appearance of plaintiff's name upon the registry lists and the assessment books of the city not being conclusive evidence that he is either a citizen or taxpayer, an answer by the city that it has no knowledge as to plaintiff's being a citizen or taxpayer, and therefore denies that he is either, is sufficient to put such facts in issue. McConoughey v. City of San Diego (1900) 60 P. 925, 128 C. 366.

Complaint, not averring that at least two or three members of county board of supervisors were about to order purchase of property and warrant on treasury for payment, did not state facts sufficient to authorize injunction. Trinity County v. McCammon (1864) 25 C. 117.

In suit for injunction to prevent railroad from constructing a double railroad track upon a bridge across a creek under a permit granted by the county board where plaintiff sued as a taxpayer on the ground that the proposed construction would greatly depreciate his property and to prevent breach of an obligation arising from a public trust, complaint did not state a cause of action. Meetz v. County of Alameda (1880) 6 P.C.L.J. 290.

27. Parties—In general

Parties in suit under this section authorizing action by resident taxpayer against officers of a county, town, city or city and county to obtain injunction restraining and preventing illegal expenditure of public funds are not required to have a personal interest in the litigation. Blair v. Pitchess (1971) 96 Cal.Rptr. 42, 486 P.2d 1242, 5 C.3d 258, 45 A.L.R.3d 1206.

Any action against sheriff to account for fees was to be prosecuted by county as party plaintiff, and not by a taxpayer, unless county officers refused to prosecute. Keith v. Hammel (1915) 154 P. 871, 29 C.A. 131.

In an action by a citizen and taxpayer to annul an order of a town board of trustees declaring that by a referendum election an ordinance granting a franchise to a railroad company had been rejected, the railroad company was not a necessary party. Reed v. Wing (1914) 144 P. 964, 168 C. 706.

In an action to have returned to a municipality certain bonds issued by it, holders of such bonds residing beyond the jurisdiction of the court were not indispensable parties, and, where no fact was alleged which would affect their title to the bonds, their omission as parties was not ground for reversal. Mock v. City of Santa Rosa (1899) 58 P. 826, 126 C. 330.

Every taxpayer in municipality may commence proceeding to enjoin city council from doing act which may add to burdens of taxation. Schumacker v. Toberman (1880) 56 C. 508, 6 P.C.L.J. 997.

A taxpayer has a right to restrain upon the part of an officer of a municipality a violation of a public trust where such violation would result in injury to himself. Meetz v. County of Alameda (1880) 6 P. C.L.J. 290.

28. —— Standing to sue, parties

Taxpayers have standing to sue school district under this section. Los Altos Property Owners Ass'n v. Hutcheon (1977) 137 Cal.Rptr. 775, 69 C.A.3d 22.

City citizens, residents, and taxpayers who sought to prevent alleged unlawful issuance of demolition permits by city officials had standing pursuant to this section to bring action seeking injunction against issuance of any more demolition permits. Kehoe v. City of Berkeley (1977) 135 Cal.Rptr. 700, 67 C.A.3d 666.

No special damage to particular taxpayer is necessary to action under this section dealing with illegal expenditures, and professor at state university, as resident taxpayer of city, had standing to seek injunction against police chief's expenditure of public funds in connection with allegedly illegal police investigatory activities on university campus. White v. Davis (1975) 120 Cal.Rptr. 94, 533 P.2d 222, 13 C.3d 757.

This section creates a right of action in taxpayers to challenge the illegal expenditure of public funds and does not act as a statute of limitations; the section authorizes action by taxpayer who has paid tax within one year last past and thus relates to standing of litigant to sue and not to his diligence in commencing suit. Plunkett v. City of Lakewood (1974) 116 Cal. Rptr. 885, 44 C.A.3d 344.

Association which represented school employees in classified service, including employees in cafeteria which district discontinued, had standing to sue to enjoin district from contracting for vending machines to dispense food at school, apart from any standing it may have had to maintain taxpayer's suit. California School Emp. Ass'n v. Sequoia Union High School Dist. (1969) 77 Cal.Rptr. 187, 272 C.A.2d 98.

Plaintiff alleging he was resident and taxpayer of county had capacity, under this section allowing a taxpayer's action to enjoin the illegal use of public funds, to maintain action against city and county and its law enforcement officials to prevent them from making statements or furnishing to press before arraignment more than a minimum amount of information concerning all persons arrested. Los Angeles County v. Superior Court for Los Angeles County (1967) 62 Cal.Rptr. 435, 253 C.A.2d 670.

Nonresident taxpayer had capacity to sue to enjoin construction, maintenance and use of pedestrian overpass. Irwin v. City of Manhattan Beach (1966) 51 Cal. Rptr. 881, 415 P.2d 769, 65 C.2d 13.

Resident and taxpayer has sufficient qualification to bring suit to enforce duty of municipality to maintain park according to terms of its dedication. City of Hermosa Beach v. Superior Court (1965) 41 Cal.Rptr. 796, 231 C.A.2d 295.

A taxpayer may obtain preventive relief against the illegal expenditure of funds by a municipal corporation. Nathan H. Schur, Inc. v. City of Santa Monica (1956) 300 P.2d 831, 47 C.2d 11.

A taxpayer may sue in a representative capacity in cases involving the failure of a governmental body to perform a duty specifically enjoined. Terry v. Bender (1956) 300 P.2d 119, 143 C.A.2d 198.

City taxpayer may sue in representative capacity in cases involving fraud, collusion, ultra vires, or failure on part of governmental body to perform a duty specifically enjoined. Pratt v. Security Trust & Savings Bank (1936) 59 P.2d 862, 15 C.A.2d 630.

A taxpayer may sue the city authorities to compel them to pay into the city treasury money illegally expended by them. Osburn v. Stone (1915) 150 P. 367, 170 C. 480.

A single citizen and taxpayer of a town may sue to annul an order declaring that by a referendum election an ordinance granting a franchise has been rejected. Reed v. Wing (1914) 144 P. 964, 168 C. 706.

This section restricts the right to sue to resident citizens, or corporations who are liable to a tax or who have paid a tax within a year. Thomas v. Joplin (1910) 112 P. 729, 14 C.A. 662.

Note 29

29. —— Impleading, parties

That a city was not formally impleaded in a taxpayer's action to compel city officers to pay into the city treasury money illegally expended did not render the complaint subject to a general demurrer. Osburn v. Stone (1915) 150 P. 367, 170 C. 480.

Where municipal officers refuse to sue for municipal funds illegally expended, the city should be impleaded as a defendant. Id.

30. Defenses generally

That a city had jurisdiction over the subject-matter of expenditures was no defense in a taxpayer's action to compel city officers to pay into the city treasury the amount of expenditures made in an illegal manner. Osburn v. Stone (1915) 150 P. 367, 170 C. 480.

31. Bar and estoppel

Act of officials estopping municipality from asserting right to rescind bond sale estopped taxpayer. Warfield v. Anglo & London Paris Nat. Bank (1927) 260 P. 881, 202 C. 345.

Municipality's delay of three years without asserting rights relative to bond sales where purchaser had changed position, barred taxpayer's suit. Id.

More than ordinary promptness is required of taxpayer seeking to rescind bond sale. Id.

Defense of laches in taxpayer's action to recover from buyer of municipal bonds difference between purchase price and par value was properly raised by demurrer. Id.

32. Immunity

Judges were immune from taxpayer's suit brought by persons being prosecuted under Pen.C. § 311 et seq. to enjoin enforcement of such laws. Gould v. People (1976) 128 Cal.Rptr. 743, 56 C.A.3d 909.

33. Sufficiency of evidence

In taxpayer's action to enjoin execution of contracts for installation of parking meters or to enjoin their performance on ground that another meter manufacturer was the lowest responsible and reliable bidder, trial court properly found that parts to be furnished and the services to be rendered by the successful bidders and by the unsuccessful bidder varied so much that there was no sufficient basis furnished upon which to prepare the bid. Hodgeman v. City of San Diego (1942) 128 P.2d 412, 53 C.A.2d 610.

Testimony was sufficient to support court's findings in action to enjoin issuance and sale of municipal bonds for sewer extension that improvements described in proceedings for issuance of bonds authorized by electors were not completed, that municipality always intended to extend sewer, that proceedings for issuance and sale of authorized bonds for such extension were valid, and that extension was necessary for protection and efficiency of sewer. Casper v. City and County of San Francisco (1936) 57 P.2d 920, 6 C.2d 376.

34. Review

On appeal from judgment of dismissal following sustaining of demurrer to plaintiff's first amended complaint, appellate court would take the allegations in complaint as true and would disregard certain defensive material which was presented to court during hearing on plaintiff's application for preliminary injunction, because defendants chose to meet the first amended complaint only by demurrer on ground that it did not state facts sufficient to constitute a cause of action. Rathbun v. Salinas (1973) 106 Cal.Rptr. 154, 30 C.A.3d 199.

§ 526b. Municipal utility bonds; restraining issuance, sale, etc.; liability for costs

Every person or corporation bringing, instigating, exciting or abetting, any suit to obtain an injunction, restraining or enjoining the issuance, sale, offering for sale, or delivery, of bonds, or other securities, or the expenditure of the proceeds of the sale of such bonds or other securities, of any city, city and county, town, county or other district organized under the laws of this state, or any other political subdivision of this state, proposed to be issued, sold, offered for sale or delivered by such city, city and county, town, county, district or other political subdivision, for the purpose of acquiring, constructing,

completing, improving or extending water works, electric works, gas works or other public utility works or property, shall, if the injunction sought is finally denied, and if such person or corporation owns, controls, or is operating or interested in, a public utility business of the same nature as that for which such bonds or other securities are proposed to be issued, sold, offered for sale, or delivered, be liable to the defendant for all costs, damages and necessary expenses resulting to such defendant by reason of the filing of such suit.

(Added by Stats.1921, c. 384, p. 575, § 1.)

Library References

Counties ⇐196.
Municipal Corporations ⇐993(3).
C.J.S. Counties § 286 et seq.
C.J.S. Municipal Corporations § 2146.

Notes of Decisions

1. Validity

This section, which is applicable to suits brought in state as well as federal courts, is not unconstitutional as applied to corporation which unsuccessfully sought such an injunction in federal court, as impairing corporation's right to resort to federal courts for redress, and as invading field belonging to exclusive jurisdiction of federal courts. Sacramento Municipal Utility Dist. v. Pacific Gas & Electric Co. (1942) 128 P.2d 529, 20 C.2d 684, certiorari denied 63 S.Ct. 530, 318 U.S. 759, 89 L.Ed. 1132.

This section is not void as lacking "uniformity", within constitutional provision requiring laws of general nature to have uniform operation, or as granting "special privileges" within constitutional provisions prohibiting the granting of privileges not granted to all citizens, or passage of special laws granting special privileges, or as denying "equal protection of the laws". Id.

Where corporation brought federal court suit to enjoin issuance of bonds by municipal utility district for purpose of acquiring electric works, and injunction was denied, application of this section was not unlawful as an attempt to regulate practice and procedure in relation to "costs" in federal courts, even if subject of costs was wholly covered by federal statutes, in view of distinction between ordinary costs and counsel fees. Id.

§ 527. Grants before judgment upon verified complaint or affidavits; service; notice of preliminary injunction or temporary restraining order; certification; order to show cause; readiness for hearing; continuance; counter-affidavits; precedence of hearing and trial; domestic violence

(a) An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. A copy of the complaint or of the affidavits, upon which the injunction was granted, must, if not previously served, be served therewith.

No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall appear from facts

INS Policy on Alien Youth Struck Down

■ En banc panel rules that 'governmental confinement of a child to an institution should be a last resort.'

By Sandra Parker
Daily Journal Staff Reporter

LOS ANGELES – In a case several federal judges described as one of the most troubling to reach the court, an en banc panel of the 9th U.S. Circuit Court of Appeals declared unconstitutional a government policy of refusing to release children suspected of being illegal aliens to anyone other than a relative.

The majority in the 7-4 decision issued Friday in *Flores v. Meese, III,* 91 Daily Journal D.A.R. 9727, said aliens have a fundamental right to be free from detention unless the government can prove that detention furthers a "significant" governmental interest.

Chief Judge J. Clifford Wallace wrote the dissent, arguing the right at stake is not fundamental, the courts should defer to the government in the "unique context" of immigration laws and the constitutional rights of juveniles are not as extensive as those given to adults.

The en banc opinion in the emotional case affirms a district court ruling ordering the Immigration and Naturalization Service to release the children – some of them younger than 5 – to a responsible adult, inform the children of the conditions of their release and automatically set an administrative hearing to determine probable cause for their arrest.

"I'm exhilarated," said Carlos Holguin, lead attorney for the children and general counsel for the National Center for Human Rights and Constitutional Law.

"It sounds to me like the majority was persuaded by the facts – what the INS was doing just didn't make sense," Holguin said after being read portions of the opinion. "This ruling is great for kids who have suffered a lot under this misguided policy. This victory in the courts will substantially strengthen the hand of those asking the INS to adopt a more humane policy in other parts of the country."

The release policy was devised at first by the INS' western regional commissioner and applied only to that region, but later was adopted in other parts of the country. Organizations opposing the policy have been meeting with INS Commissioner Gene McNary in an effort to institute a less-restrictive policy nationwide.

'This victory in the courts will substantially strengthen the hand of those asking the INS to adopt a more humane policy in other parts of the country.'

Carlos Holguin, lead attorney for the children

Assistant U.S. Attorney Stan Blumenfeld, who represented the INS, declined comment on the ruling or on whether the government plans to appeal to the U.S. Supreme Court.

A former Assistant U.S. Attorney on the case, Ian Fan, said the court should have applied a rational-basis test, rather than a strict-scrutiny test.

"Nowhere is there a fundamental right to freedom from bodily restraint. It's a due process right, but it's not a fundamental right and is not entitled to strict scrutiny," Fan said. "I wouldn't be surprised if the government took it up and the Supreme Court reversed."

Writing for the majority, Judge Mary Schroeder said the INS failed to show that its "blanket" policy is necessary to ensure children's appearance at deportation hearings or that it protects the agency from liability for releasing them. The additional fact that the detainees are children adds to the agency's burden to prove they should be incarcerated.

"This case in unprecedented in that it involves post-arrest detention of persons who have not been convicted of any crime, do not pose a risk of flight, and who have not been determined to present any threat of harm to themselves or to the community."

Joining Schroeder in the majority opinion were Judges Thomas Tang, Dorothy Nelson, William Canby, William Norris, David Thompson and Pamela Rymer. Rymer dissented in part and Tang and Norris issued separate concurring opinions.

The majority said the INS presented no evidence that children released to unrelated adults prior to the adoption of the policy suffered any ill treatment. The agency's contention that it needed to conduct "home studies" of potential caretakers was undermined by its own assertion of little expertise in the field of child welfare, the majority said.

"Child welfare is not an area of INS expertise and its decisions in this area are not entitled to any deference," Schroeder wrote.

Nor did the policy insulate the INS from liability because governmental agencies face more exposure to suits by maintaining custody of the children, the majority said, citing the recent U.S. Supreme Court decision in *International Union, UAW v. Johnson Controls*. In that case, the court struck down a policy excluding pregnant women from holding certain jobs because of the company's fear of liability, which the court said was "remote at best" and did not justify violating individual rights.

In addition, the judges noted that congressional policy favors housing minors in foster home or community facilities rather than institutionalizing them.

Tang wrote a separate concurrence to emphasize that the liberty at stake is a fundamental one and that the dissent's characterization of it "stands the Constitution on its head."

Judge John T. Noonan said the INS' policy "not only violates due process, but does so flagrantly . . . The dissent casts the INS as a parent, but I see only a jailer."

In her separate opinion, Rymer said the case "touches a raw nerve in us all" but said it could have been decided on narrower grounds because the INS regulations "fail to meet minimum requirements of procedural due process."

In the dissent, Wallace said the majority erred in defining the issue as a blanket denial of liberty and giving it status as a fundamental right rather than the right to be released to unrelated adults.

He called the majority's conclusion "novel" and said it led them to engage in a discussion of issues "irrelevant" to the true issue in the case. As he argued in the three-judge panel decision last June upholding INS' regulation, Wallace said the INS should be given deference by the courts because of the political nature of immigration laws. He also said the court must consider the "accepted principle" that children's constitutional rights are more limited than those accorded to adults.

He was joined in the dissent by Judges Charles Wiggins, Melvin Brunetti and Edward Leavy.

OPLE v. SAUNDERS: Reject-*Bracamonte*, court rules bif-d trial not required on prior conviction allegations. C.A. 2d

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INSIDE

But When Is the ideo Coming Out?

ue or Not to Sue" and "Super-evisited" are just two of the in-s included on an audio tape ed by McKenna & Cuneo to aintain contact with their clients. r Talk. *Page 2*

Exclusive Policies

ay's commentary, Russell Leib-d Paula LaBrie say a battle is g over whether insurers may liability for the acts of execu-f failed S&Ls through exclusion ons in certain policies. *Page 4*

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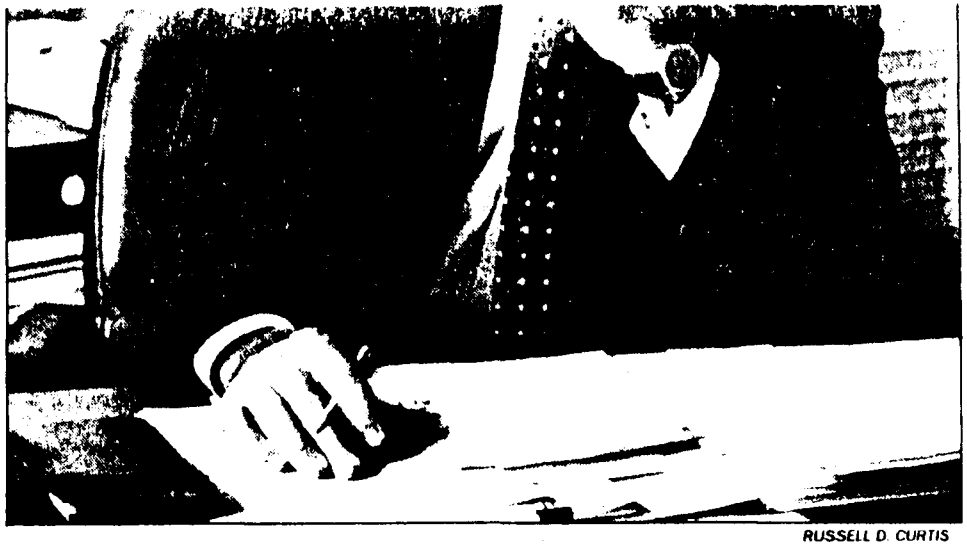
nightmare that Bhandari alleges cost him his job, his proprietary technology and his millions because Sonsini never got around to putting an oral agreement into writing. Adding insult to injury, Bhandari claims, Sonsini approved his own client's firing.

The lack of a written contract is the basis of two suits filed by Bhandari, 51, who immigrated to this country from India 30 years ago.

The first suit accuses Sonsini, a partner with Palo Alto's Wilson, Sonsini, Goodrich & Rosati, of legal malpractice. The second action, on the Santa Clara County Superior Court master calendar for today, targets San Jose's Cypress Semiconductor Corp. and its dynamic leader T.J. Rodgers. *Bhandari v. Cypress Semiconductor*, No. 677601, relates to Bhan-

See CHIP MAKER page 10



RUSSELL D. CURTIS

LAWRENCE SONSINI: The Palo Alto lawyer is accused of malpractice for helping to fire his own client. Sonsini says he never represented the man.

Judges Trade Fire in Ruling On INS Kid-Detention Regs

The Recorder 8/12/91 p.1, col 2

By LISA STANSKY

A bitter volley of opinions accompanied Friday's *en banc* Ninth Circuit ruling that struck a government policy of detaining undocumented alien children who are awaiting deportation hearings.

Judges Thomas Tang and William Norris, part of the seven-judge majority, wrote separate opinions blasting Chief Judge J. Clifford Wallace's June 1990 panel decision. That 2-1 ruling upheld the Immigration and Naturalization Service's policy because, Wallace declared, undocumented alien children have no liberty interest that is violated by the policy.

That view "ignores the very substance of the Bill of Rights," Tang asserted.

And Norris warned that Wallace's deference to Congress on immigration matters "should not be the siren song that leads us astray from applying settled due process principles to the facts of this case."

In the majority opinion written by Judge Mary Schroeder, the court ruled that the class of undocumented alien children does have a fundamental liberty interest under the U.S. Constitution.

The ruling, a first nationwide, will affect thousands of children who are picked up by the INS each year, said plaintiffs' co-counsel James Morales, staff attorney with the San Francisco-based National Center for Youth Law.

Wallace, a member of Friday's 11-judge panel, wrote a dissent that took some slaps at the majority and defended his earlier panel decision.

"I find much of the majority's discuss-

See JUDGES page 9

RUSSELL D. CURTIS

JUDGE J. CLIFFORD WALLACE: Ninth Circuit chief whose panel opinion was overturned took the en banc majority to task in a dissent.

IAL NEWSPAPER BY RULES OF COURTS FOR: U.S. DISTRICT COURT, NORTHERN CALIFORNIA; SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO; AND THE MUNICIPAL COURT, SAN FRANCISCO

cisco solo practitioner George Donaldson and Washington, D.C.'s Jonathan Cuneo, claim local court jurisdiction largely on the basis of naming BofA as a defendant and a Bay Area resident alien as class plaintiff. The plaintiff, Shrichand Chawla, deposited $600,000 in an overseas BCCI branch.

The bulk of the class members are also believed to have made their deposits overseas.

But BCCI had tentacles everywhere, with branches from San Francisco — although that one was closed in 1989 — to key operations in England, the Cayman Islands and Luxembourg. Foreign and domestic regulators moved to seize BCCI operations in seven nations July 5. The bank's reach thus leaves Lerach's class action vulnerable to jurisdictional attack, according to lawyers familiar with the case.

formally served.

The racketeering complaint accuses the defendants of engaging in a long-running conspiracy to loot BCCI depositors, allowing the huge international bank to take part in everything from money laundering to terrorism. Virtually all of the allegations have surfaced in press reports, including the alleged role of Washington insider Clifford. Clifford's counsel, Charles Rauh of the Washington branch of Skadden, Arps, Slate, Meagher & Flom, had not seen the suit and declined comment.

Lerach, whose firm has built up perhaps the largest securities fraud practice on the West Coast, has a string of eight-figure triumphs to his credit going into the BCCI litigation. Most recently, he obtained a roughly $100 million verdict in the Apple Securities litigation in San Jose.

though it knew BCCI was going to continue and indeed expand its illegal operations." BofA was a repository for an estimated $175 million in BCCI deposits, the suit also alleges.

Bank of America, a co-founder of BCCI in 1972, held a 25 percent stake in the bank. BofA contends it withdrew from the BCCI partnership in 1980 because of differences over banking practices, but plaintiff lawyers are trying to show that BofA knew when it pulled out of the partnership that BCCI was involved in a host of illegal activities. Further, the suit suggests that BofA, through inaction during the 1980s, aided in BCCI's racketeering enterprise by not revealing what it knew about the bank's illegal activities.

Lerach asserts that parties to a conspiracy can't "absolve themselves by withdrawing their profits and leaving."

The author of RICO, meanwhile, told *The Recorder* that the BCCI case appears tailor-made for the racketeering statute, and that it can be used against foreign officials if they are shown to have engaged in a fraud involving interstate or foreign commerce.

"If RICO doesn't apply to this, what does it apply to?" said Notre Dame Law School professor G. Robert Blakey.

The key to the San Francisco litigation, Blakey said, is whether plaintiff lawyers can prove that each defendant was part of the BCCI conspiracy — even those who have not been named in the New York indictments or who are part of an ongoing Justice Department criminal probe. "If they can't indict them," Blakey said, "then it would seem Lerach will have trouble [pressing a RICO] claim against them."

Judges Trade Shots in Ruling on INS Detaining Kids

Continued from page 1

ion . . . irrelevant to the crucial issues in this case, and other portions of the opinion lacking in support," he wrote.

According to the majority opinion, in 1984 the western region of the INS adopted a policy barring release of detained minors to anyone other than a parent or legal guardian, except "in unusual and extraordinary cases." The policy eventually was adopted nationwide.

Children who could not be placed with parents or guardians were held in detention camps. There they were subjected to strip searches and placed with unrelated adult men and women, according to court papers.

In 1985, a group of detained minors sued the INS in U.S. District Court in Los Angeles, claiming that the agency had violated their rights by refusing to consider turning them over to unrelated but appropriate adults such as social service agencies. The suit later was certified a class action.

U.S. District Judge Robert Kelleher agreed, and ordered the INS to conduct hearings to determine whether and under what conditions the minors could be released. That ruling was reversed by the June 1990 Ninth Circuit panel ruling.

Kelleher's position was affirmed by Friday's split court, which produced five separate opinions. Schroeder wrote for the majority — joined by Judges Dorothy Nelson, David Thompson and William Canby — that English law dating back to 1679 supports the children's right to challenge their detention. She compared the minors' liberty interest to that of a prisoner filing a *habeas corpus* petition.

The INS' rationales for detaining the minors were that it lacked the resources to investigate the individuals who were seeking to take charge of the children, and that the agency could be held liable for placing the children in insecure situations. The INS argued that it was acting in the children's best interest by keeping them in custody.

But Schroeder rejected those arguments, declaring that "[t]he blanket refusal to make individualized determinations in the guise of administrative expediency . . . cannot pass constitutional muster."

Judge Pamela Rymer wrote a separate concurrence and dissent, stating that the court should have simply struck the INS policy as procedurally inadequate, without reaching the question of whether undocumented children have a basic constitutional liberty interest.

Wallace, joined by Judges Charles Wiggins, Melvin Brunetti and Edward Leavy, accused the majority of treading on congressional turf, declaring that his colleagues "[ignore] the fact that any judicial branch intrusion . . . severely undermines congressional power over immigration."

Carole Levitzky, public affairs officer for the U.S. attorney's office in Los Angeles, which handled the INS' case, said she could not comment on whether the government will seek review with the U.S. Supreme Court. "We will be reviewing our options," she said.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNY LISETTE FLORES, a minor, by next friend MARIO HUGH GALVEZ-MALDONADO; DOMINGA HERNANDEZ-HERNANDEZ, a minor, by next friend JOSE SAUL MIRA; ALMA YANIRA CRUZ-ALDAMA, a minor, by next friend HERMAN PERELLO TANCHEZ,

Plaintiffs-Appellees,

v.

EDWIN MEESE, III; IMMIGRATION & NATURALIZATION SERVICE; HAROLD EZELL,

Defendants-Appellants.

No. 88-6249

D.C. No. CV-85-4544-RJK

OPINION

Appeal from the United States District Court
for the Central District of California
Robert J. Kelleher, District Judge, Presiding

Argued En Banc and Submitted
April 18, 1991—Pasadena, California

Filed August 9, 1991

Before: Wallace, Chief Judge, Tang, Schroeder, D.W. Nelson, Canby, Norris, Wiggins, Brunetti, Thompson, Leavy, and Rymer, Circuit Judges.

Opinion by Judge Schroeder; Concurrence by Judge Tang; Concurrence by Judge Norris; Partial Concurrence and Partial Dissent by Judge Rymer; Dissent by Judge Wallace, with whom Judges Wiggins, Brunetti and Leavy join.

SUMMARY

Constitutional Law/Immigration and Naturalization

Vacating a previous majority panel opinion and affirming the district court judgment, the court of appeals, en banc, held that the Immigration and Naturalization Service blanket detention of children during the pendency of deportation proceedings is unconstitutional.

Jenny Lisette Flores brought a class action suit against appellant Immigration and Naturalization Service (INS) challenging its regulatory policy requiring governmental detention of children during the pendency of deportation proceedings. Detention is required unless there is an adult relative or legal guardian available to assume custody, regardless of the availability of another responsible adult willing and able to care for the child and ensure the child's attendance at a deportation hearing. In promulgating the regulation in question, the INS did not refer to any particular problem that had arisen in the course of administering the immigration laws as they affected children, nor did the INS state any basis for its assumption that home studies would have to be conducted before releasing children to unrelated adults prior to the promulgation of this policy. The district court held that the limitation on release to parents or legal guardians violated equal protection. That court also invalidated the blanket detention of minors where a responsible adult could ensure attendance at the deportation hearing, and it required a hearing before a neutral and detached official in each case to determine whether release was appropriate and the conditions of release. A divided panel vacated the district court order, holding that the detention policy did not violate the constitution. Concerning the administrative hearing required by the district court in each instance of detention, the panel majority remanded, concluding that the test would involve a balancing of the children's interest in release to a responsible adult, which the majority viewed as not constitutionally protected, against the governmental interests, which it viewed as entitled to substantial deference. In the en banc petition, Flores argued that the panel majority erred in failing to recognize their fundamental interest in liberty, and holding that any procedure other than an individual hearing before an independent officer could provide adequate protections for the right at stake.

[1] The Constitution protects the rights of aliens to due process and equal protection. **[2]** It has long been accepted that alienage does not prevent a person from testing the legality of confinement through habeas corpus. **[3]** That the detention at issue here is a civil detention imposed in the course of administering the immigration laws did not alter the relevance of the principles of habeas corpus. **[4]** Thus, the court held that aliens have a fundamental right to be free from governmental detention unless there is a determination that such detention furthers a significant governmental interest. Aliens have the habeas corpus guaranty of testing the validity of their detention through judicial scrutiny of the basis for confinement at the hands of the government.

[5] The court noted that the Constitution protects the rights of children to due process of law in conjunction with any deprivation of liberty. Governmental confinement of a child to an institution should be a last resort. **[6]** Congressional policy, where relevant, also favors avoidance of the institutionalization of juveniles. **[7]** Thus, the court reached the conclusion that, just as Flores', and the other plaintiff's, entitlement to liberty absent a valid, particularized basis for confinement does not diminish due to their alienage, their minority does not materially change the nature of that entitlement. The INS was incorrect in asserting that Flores had no liberty interest at stake. The childrens' release was not the constitutional interest being secured, but rather, the interest in freedom from unjustified governmental intrusion.

[8] The INS did not articulate any legal basis for its reasons justifying detention. There is no presumption in favor of gov-

ernmental detention as serving the best interests of a child. [9] While courts owe deference to the INS where its special experience and authority in the area of alienage are called into play, [10] the justifications asserted here, relate to child welfare and the potential liability of child welfare agencies. Because child welfare is not an area of INS expertise, its decisions in this area are not entitled to any deference. The INS policy was contrary to Congress' determination that institutional detention of juveniles is disfavored. Therefore, the court held that the INS may not determine that detention serves the best interests of members of the plaintiff class in the absence of affirmative evidence that release would place the particular child in danger of some harm.

[11] However, this conclusion did not absolve the INS from the responsibility of making individualized decisions concerning the fate of children it has arrested. The blanket refusal to make individualized determinations in the guise of administrative expediency, cannot pass constitutional muster. [12] The court found little indication that the INS would be subject to liability for releasing a minor to an unrelated adult without a "home study." [13] Governmental agencies face far greater exposure to liability by maintaining a special custodial relationship than by releasing children from the constraints of governmental custody. Thus, the court rejected the INS' claim that it must detain these children to avoid lawsuits. Therefore, the Ninth Circuit upheld that the district court's order mandating the release of such children to a responsible adult was a proper remedy.

[14] The court also affirmed the district court's order requiring an administrative hearing concerning the INS' decision to detain. The court noted that, under current regulations, the INS is already required to maintain the mechanisms for providing review by an Immigration Judge of any decision to detain an alien or of conditions imposed on the release of such alien, if the alien requests such a hearing. The INS was now further required, when the alien is a child, to hold a hearing

regardless of whether the alien child requests it, and a determination that includes an inquiry into whether any non-relative who offers to take custody represents a danger to the child's well being.

Concurring wholeheartedly, Judge Tang wrote separately to emphasize his belief that the liberty interest at issue — freedom from governmental detention and restraint — is a fundamental right expressly protected by the fifth amendment to the Constitution. To reduce liberty, as the original panel and the dissent suggested, to nothing more than an entitlement to certain procedural protection and thereby to burden the children with showing a "right to release" ignored the very substance of the Bill of Rights.

Also concurring, Judge Norris stated that the INS' policy of incarcerating children pending deportation hearings rather than releasing them to the temporary custody of responsible non-relative adults, not only violates due process, but does so flagrantly. The governmental interests asserted by the INS to justify its policy were trivial.

Judge Rymer concurred in the judgment in part and dissented in part. Judge Rymer wrote separately, although agreeing with much of the majority's bottom line, because of her belief that the case could be decided more narrowly and in a way that would safeguard valuable rights more effectively than the district court's order provided. However, Judge Rymer did not believe that the Constitution substantively requires release to any responsible adult who will promise to bring the minor to future hearings, and that a probable cause hearing is constitutionally required for juveniles held in deportation proceedings.

Chief Judge Wallace, joined by Judges Wiggins, Brunetti, and Leavy, dissented. They believed the majority erred in implicitly defining the right at issue here as a blanket denial of liberty, thereby granting it a fundamental character, and in

ignoring the deference that courts have traditionally paid to immigration laws and regulations.

COUNSEL

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Mark Isoler, Youth Law Center, San Francisco, California, for the amici curiae.

E. Richard Larson, Mexican-American Legal Defense and Education Fund, Los Angeles, California, for the amici curiae.

Maria Savasta Kennedy, Pettit & Martin, San Francisco, California, for the amici curiae.

OPINION

SCHROEDER, Circuit Judge:

I. *INTRODUCTION*

This is a class action challenging an INS policy that requires governmental detention of children during the pendency of deportation proceedings. That policy is now codified at 8 C.F.R. § 242.24 (1988). Detention is required unless there is an adult relative or legal guardian available to assume custody, even where there is another responsible adult willing and able to care for the child and able to ensure the child's attendance at a deportation hearing. The INS acknowledges that the regulation is not necessary to ensure such attendance. It does not contend that the release of children so detained would create a threat of harm to the children or to anyone else.

The district court held that a blanket detention policy in such circumstances is unlawful. It entered an order that required, where feasible, release to a responsible party of children who would otherwise have been released if a parent or other relative had come forward. The order further required an administrative hearing for each child to determine whether, and under what conditions, the child should be released.

The INS and Attorney General appealed and a divided panel reversed the district court's holding that the detention policy was unlawful. The panel remanded for the district court to determine what procedural protections would be appropriate under *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine whether there was sufficient cause to detain a juvenile pending further proceedings. A majority of active judges voted to rehear the case en banc because of the importance of the issues involved and the impact of the policy on large numbers of children arrested as illegal aliens in the Western United States. We now affirm the district court's order.

II. *BACKGROUND*

This case concerns the treatment of children who are arrested on suspicion of being illegal aliens but who have not yet been determined to be deportable. Because the children are persons present in the United States they must be afforded procedural protections in conjunction with any deprivation of liberty. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

Plenary authority to determine what categories of aliens may lawfully reside in the United States and what categories must be deported resides in the Congress. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Congress has delegated the duties of the administration of the immigration laws to the Attorney General, who oversees the work of the Immigration and Naturalization Service. 8 U.S.C. § 1103(a) (granting the Attorney General authority to "establish such regulations . . . as he deems necessary" to administer and enforce the immigration laws).

Only one relevant statutory provision addresses the release or detention of aliens between the time of their arrest and the determination of deportability or non-deportability. That statute is 8 U.S.C. § 1252(a)(1), which in all material respects has remained the same for the last four decades. It presently provides:

> Pending a determination of deportability . . . [an] alien may, upon warrant of the Attorney General, be arrested and taken into custody. . . . [A]ny such alien . . . may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond . . . containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole.

To implement this statute, the Attorney General promulgated regulations in 1963, which are still in effect, providing that aliens arrested on the suspicion of deportability could be released until further proceedings upon a determination that such release was appropriate, and under conditions determined by the INS. 8 C.F.R. § 242.2(c)(2). Upon request, an alien is entitled to a hearing before a disinterested officer, an immigration judge, to determine eligibility for release. 8 C.F.R. § 242.2(d).

In 1984, the Western Region of the INS adopted a separate policy for minors. That policy provided that minors would be released only to a parent or lawful guardian. In his memorandum implementing this policy, former Western Region Commissioner Harold Ezell stated that the limits on release were "necessary to assure that the minor's welfare and safety is maintained and that the agency is protected against possible legal liability." The policy also provided for release to another responsible adult "in unusual and extraordinary cases, at the discretion of a District Director or Chief Patrol Agent." The Regional Commissioner did not refer to any problems that had arisen under existing regulations. He did not cite any instances of harm which had befallen children released to unrelated adults, nor did he make any reference to suits that had been filed against the INS arising out of allegedly improper releases. It has remained undisputed throughout this proceeding that the blanket detention policy is not necessary to ensure the attendance of children at deportation hearings.

Implementation of this policy sparked concern in a number of quarters because the policy resulted in the governmental detention of a large number of children who posed no apparent risk to the community and whose presence at their respective hearings could be ensured by responsible individuals. Various individuals and groups, including many appearing as amici in this rehearing en banc, were among those who reacted adversely to the new policy. These included church groups, Amnesty International, Lawyers' Committee for Human Rights, International Human Rights Law Group and Defense for Children International.

During the course of this litigation, the INS codified the regional policy into the nationally applicable regulation now at issue. In promulgating that regulation, the INS did not refer to any particular problem that had arisen in the course of administering the immigration laws as they affected children. Rather, it simply cited the "dramatic increase in the number of juvenile aliens" found unaccompanied by a parent, guardian or a adult relative. 53 Fed. Reg. 17,449 (May 17, 1988). The regulation allows release to a somewhat broader class of people than did the Western Region policy, i.e., a variety of adult relatives as opposed to just parents and legal guardians, but it prohibits release in cases where other responsible adults are available to take custody of the minor. It permits release to unrelated adults only in "unusual and compelling circumstances." 8 C.F.R. § 242.24.[1]

[1]The regulation provides in full as follows:

Detention and release of juveniles.

(a) *Juveniles*. A juvenile is defined as an alien under the age of eighteen (18) years.

(b) *Release*. Juveniles for whom bond has been posted, for whom parole has been authorized, or who have been ordered released on recognizance, shall be released pursuant to the following guidelines:

(1) Juveniles shall be released, in order of preference, to : (i) A parent; (ii) legal guardian; or (iii) adult relative (brother, sister, aunt, uncle, grandparent) who are not presently in INS detention, unless a determination is made that the detention of such juvenile is required to secure his timely appearance before the Service or the immigration court or to ensure the juvenile's safety or that of others.

In cases where the parent, legal guardian or adult relative resides at a location distant from where the juvenile is detained, he or she may secure release at an INS office located near the parent, legal guardian, or adult relative.

(2) If an individual specified in paragraph (b)(1) of this section cannot be located to accept custody of a juvenile, and the juvenile has identified a parent, legal guardian, or adult relative in INS detention, simultaneous release of the juvenile and the parent, legal guardian, or adult relative shall be evaluated on a discretionary case-by-case basis.

(3) In cases where the parent or legal guardian is in INS detention or outside the United States, the juvenile may be released to such person as designated by the parent or legal guardian in a sworn affidavit, executed before an immigration officer or consular officer, as capable and willing to care for the juvenile's well-being. Such person must execute an agreement to care for the juvenile and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(4) In unusual and compelling circumstances and in the discretion of the district director or chief patrol agent, a juvenile may be released to an adult, other than those identified in paragraph (b)(1) of this section, who executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings before the INS or an immigration judge.

* * *

In promulgating the regulation, the INS recognized that the principal factor bearing on release or detention is the likelihood of appearance at future proceedings. It also recognized that the policy of preventing release to responsible adults was not related to the issue of flight risk or the administration of any provision of the immigration laws. Its principal justification for the detention rule was the theory that unless the INS were able to do a comprehensive "home study" of the proposed custodian, the child's own interests would be better served by detention. The INS stated:

> As with adults, the decision of whether to detain or release a juvenile depends on the likelihood that the alien will appear for all future proceedings. However, with respect to juveniles a determination must also be made as to whose custody the juvenile should be released. On the one hand, the concern for the welfare of the juvenile will not permit release to just any adult. On the other hand, the Service has

> neither the expertise nor the resources to conduct home studies for placement of each juvenile released.

53 Fed. Reg. at 17,449.

In response to comments suggesting that release to responsible adults should be permitted on a regular basis, the INS stated that it did not have the resources or expertise necessary to make a determination, in each case, whether release to the adult in question would be in the child's best interests. 53 Fed. Reg. at 17,449. The INS did not state any basis for its assumption that home studies would have to be conducted. Nor did the INS indicate that it had conducted such studies before releasing children to unrelated adults prior to the promulgation of this policy. Commenters also complained that the regulation's provision that release to unrelated adults could occur in "unusual and compelling circumstances" was too vague to provide meaningful guidance. The INS responded that such vagueness was deliberate, designed to provide "the broadest possible discretion" to INS officials. *Id.* Finally, commenters suggested that the INS should permit individuals or organizations to act as intermediaries between the INS and the parent or guardian of an alien child, to allow for release where that parent or guardian is afraid to come forward personally because of his or her own illegal alien status. After pointing out that "[t]his proposal raises some of the same concerns that release to any reliable adult raises, for example, the inability of the Service to perform home studies," the INS concluded that it would "continue to consider the proposal," but would promulgate the regulation without such a provision at this time. *Id.* at 17,450. The final regulation was approved on May 17, 1988.

The named plaintiffs, including named plaintiff Jenny Flores, filed the action on July 11, 1985, challenging the Western Region's policy then in effect. These named plaintiffs represented a class of minors who do not pose a risk of flight or harm to the community, and have responsible third parties available to receive them, and are thus being detained only because no adult relative or legal guardian is available to take custody of them. Their complaint contained a number of claims. In the panel majority opinion, Judge Wallace described them as follows:

> The first claim alleged that the Western Region's bond release condition violated the Immigration & Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, the Administrative Procedure Act (APA), 5 U.S.C. § 552 *et seq.*, the fifth amendment's due process clause and equal protection guarantee, and international law. Flores's second claim challenged the INS's failure to provide (1) "prompt written notice" to the detainee that the bond release condition had been imposed, and (2) "prompt, mandatory, neutral and detached" review following arrest of (a) whether probable cause to arrest existed, (b) whether imposition of the bond condition was necessary to ensure future appearance, and (c) whether any available adult was suitable to ensure the detained juvenile's well-being and appearance at future proceedings. The second claim alleged that these failures violated due process and international law. Plaintiffs' last five claims, which challenged various conditions of the minors' confinement, ... were resolved by settlement or motion . . . .

Flores v. Meese, No. 88-6249, slip op. 10747, 10764-65 (9th Cir. Sept. 7, 1990)(as amended). After the policy originally in question was codified as a regulation, this litigation was maintained as a challenge to that regulation.

Between the time that the complaint was filed and the promulgation of the national regulation implementing the Western Region policy, the district court disposed of several motions. With respect to the limitation on release to parents

or legal guardians, the court ruled the provision violated equal protection. It agreed with Flores that the INS' practice of permitting alien minors in exclusion proceedings to be released to a broader class of adults than those in deportation proceedings was not supported by a rational justification. *See* 8 C.F.R. § 212.5(a)(2)(ii) (1987) (alien minors in exclusion proceedings could be released to adult relatives or to non-relatives). When the INS promulgated the regulation here at issue, it amended the regulation regarding release of children in exclusion proceedings to incorporate by reference the same restrictions as those operative in the deportation context, thus mooting the district court's ruling on this issue. *See* 8 C.F.R. § 212.5(a)(2)(ii)(1988). The court still had under advisement various motions relating to the procedural implementation of the INS' policy when the INS promulgated the official regulation.

Upon promulgation of the regulation, the district court asked for supplemental briefs and then entered an order granting summary judgment to the plaintiff class. The order invalidated the blanket detention of minors where a responsible adult could ensure attendance at the deportation hearing, and it required a hearing before a neutral and detached official in each case to determine whether release was appropriate and the conditions of release. The order provided:

> 1. Defendants . . . shall release any minor otherwise eligible for release on bond or recognizance to his parents, guardian, custodian, conservator, or other responsible adult party. Prior to any such release, the defendants may require from such persons a written promise to bring such minor before the appropriate officer or court when requested by the INS.
>
> 2. Whenever a minor is released as aforesaid, the minor shall be promptly advised in writing in a language he understands of any restrictions imposed upon his release.
>
> 3. Any minor taken into custody shall be forthwith afforded an administrative hearing to determine probable cause for his arrest and the need for any restrictions placed upon his release. Such hearing shall be held with or without a request by or on behalf of the minor.

The Attorney General and INS appealed. The majority of the panel for our court vacated the first paragraph of the district court's order, holding that the detention policy did not implicate any of the plaintiffs' fundamental rights, and that due deference to the INS' choices in implementing congressional immigration policy required approval of the INS detention policy restricting release. The majority characterized the right claimed by the class as a substantive due process right "to be released to an unrelated adult." Slip op. at 10788. Finding that the Constitution does not guarantee such a right, the majority applied a highly deferential standard of review to what it saw as an exercise of the INS' unique expertise and authority.

In considering the procedural aspects of the district court's order as embodied in paragraph three, the panel majority remanded. It rejected the appellees' contention that the fourth amendment requirement of review by a neutral and detached magistrate of probable cause for arrest, as the Supreme Court has enunciated in *Gerstein v. Pugh*, 420 U.S. 103 (1975), was applicable in the context of civil deportation proceedings. Rather, it chose as the appropriate model for procedural due process evaluation the balancing test outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976). That test would involve a balancing of the children's interest in release to a responsible adult, which the majority viewed as not constitutionally protected, against the governmental interests, which it viewed as entitled to substantial deference.

Judge Fletcher, in dissent, described the case as "among the most disturbing I have confronted in my years on the court." Slip op. at 10803. She characterized the district court's order as a "simple, sensible, minimally intrusive direction," *id.* at 10804, to protect the fundamental liberty interests of the plaintiffs who, in her view, should not be denied liberty when their "only possible offense is their alienage." *Id.* at 10803.

In their petition for rehearing en banc, plaintiffs contend, inter alia, that the panel majority erred in failing to recognize their fundamental interest in liberty. It also erred, they argue, in holding that, under either *Gerstein v. Pugh* or *Mathews v. Eldridge*, any procedure other than an individual hearing before an independent officer could provide adequate protections for the right at stake.

Before us for decision are three principal sets of issues. The first involves the detention policy itself and whether it affects any constitutionally protected liberty interests of the plaintiffs. The second involves the nature of the federal governmental interest furthered by such a policy, the justifications set forth by the agency for such a policy and the extent to which we must defer to the agency in the promulgation of such policies. The third is whether, after examination of these issues, the appropriate procedural model for the determinations at issue is the criminal model of *Gerstein v. Pugh* or the civil model of *Mathews v. Eldridge*, or indeed whether, in the context of this case, it makes any difference whether a criminal or civil model is chosen. Our discussion focuses on each of these areas in turn.

III. *DISCUSSION*

Defendants maintain that the plaintiffs' liberty interests are limited because of their status as aliens and children. We therefore examine in some detail the manner in which courts and Congress deal with the questions of rights of aliens and children.

A. *Plaintiffs' Interests as Aliens*

[1] The Constitution protects the rights of aliens to due process and equal protection. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Even illegal aliens enjoy the due process protections of the fifth amendment. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). It is now well established that under these cases any person present in the United States is entitled to equal justice before the law, including procedural protections in conjunction with any deprivation of liberty, and freedom from invidious discrimination. *See* C. Antieau, 1 *Modern Constitutional Law* §§ 9:25-9:27 (1969 & Supp. 1991).

A crucial component of the right to personal liberty is the ability to test the legality of any direct restraint that the government seeks to place on that liberty. This ability is guaranteed through the availability of the writ of habeas corpus to challenge the lawfulness of one's imprisonment. The right to seek such a writ has its roots in English law that predates the formation of this nation. *See* Habeas Corpus Act of 1679, 31 Car. II Ch. 2. It was incorporated among the first rights guaranteed by the United States Constitution. U.S. Const. art. I, § 9. There thus can be no question that this right is a key part of the American legal system.

In any discussion of the constitutional guarantee of liberty, the importance of habeas corpus must not be understated. As one commentator has described it:

> Over the centuries habeas corpus has been the common-law world's "freedom writ" by whose process the courts may require the production of all prisoners and inquire into the legality of their incarceration, failing which they have been set free. Of the writ of habeas corpus, the United States Supreme Court has appropriately noted: "There is no higher duty than to maintain it unimpaired."

1 *Modern Constitutional Law* § 5:148 at 436 (quoting *Bowen v. Johnston*, 306 U.S. 19, 26 (1939)). For this reason, to assess the nature of an alien's liberty interest, it is appropriate to look to the extent courts have historically recognized such an interest through habeas corpus proceedings.

[2] It has long been accepted that alienage does not prevent a person from testing the legality of confinement through habeas corpus. *See Wong Wing v. United States*, 163 U.S. 228 (1896). Indeed, even a would-be immigrant who is prevented from landing in the United States and is, in that way, deprived of liberty "is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful." *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892). Thus, the status of the plaintiff class in this case as aliens whose presence in this country might be illegal does not affect their right to put the government to its proof concerning the legality of their detention.

[3] That the detention at issue here is a civil detention imposed in the course of administering the immigration laws does not alter the relevance of the principles of habeas corpus. Still the leading case involving a test of the legality of detention under immigration laws is *Carlson v. Landon*, 342 U.S. 524 (1952). In that case, the Supreme Court dealt with a petition for habeas corpus by aliens detained prior to deportation under the Internal Security Act of 1950, because of their membership in the Communist Party of the United States. Noting that "[d]eportation is not a criminal proceeding" and thus the detention at issue was administrative, not punitive, 342 U.S. at 538, the Court nevertheless employed habeas corpus review as the appropriate means for the individual aliens to challenge their detention.

The petitioners in *Carlson* challenged their pre-deportation detention on the ground that there had been no sufficient showing that they presented an actual risk of flight or harm to the community if released pending further proceedings. Rather, they were denied release on a finding that each was an active member of the Communist party. This finding, they argued, was not sufficient to support detention. *See* 342 U.S. at 533-34.

The Court rejected this argument on the ground that the decision to detain them based on their active membership in the Communist party was made through an exercise of the discretion delegated to the Attorney General under the immigration laws. The delegated discretion was to determine which aliens pose a threat of harm to the community. The Court held that detention based on Communist party membership and activity was not an abuse of that discretion. The Court noted that the evidence went "beyond unexplained membership and show[ed] a degree . . . of participation in Communist activities." 342 U.S. at 541. Because the Court also agreed with the INS that "the doctrines and practices of Communism clearly enough teach the use of force to achieve political control," *id.* at 535-36, it found that the detention of the petitioners was proper since they posed "a menace to the public interest." *Id.* at 541.

The Court was careful to observe, however, that the discretion of the Attorney General was not without bounds. The INS policy in *Carlson* did not amount to blanket detention. The Court pointed out that there was "no evidence or contention that all persons arrested as deportable . . . for Communist membership are denied bail." *Id.* at 541-42. It went on to note that the evidence before it indeed illustrated that release pending further proceedings was granted "in the large majority of cases." *Id.* at 542.

The most recent comprehensive Supreme Court discussion of an individual's interest in liberty is set in the context of adults held in pretrial detention without regard to citizenship. *United States v. Salerno*, 481 U.S. 739 (1987). The Court there recognized "the individual's strong interest in liberty," which it characterized as a "fundamental" right with which

Congress could interfere only with a "careful delineation of the circumstances under which detention will be permitted . . . ." 481 U.S. at 750-51. Detention was justified only by clear and convincing evidence that the arrestee presented "an identified and articulable threat to an individual or the community . . . ." *Id.* at 751. Significantly, the Court drew a parallel between the detention at issue in *Carlson* and that challenged in *Salerno* by noting that the *Carlson* petitioners were permissibly detained during the pendency of deportation proceedings because they were "potentially dangerous." 481 U.S. at 748. It did not in any way suggest that aliens' liberty interests were any less fundamental than those of citizens.

History may have passed *Carlson* by in some respects, particularly in its assessment of the danger attending political activity, but the case, in significant respects relevant to this case, provides guidance. *Carlson* holds that under our Constitution and an Immigration Act materially the same as the current one, the INS cannot detain individuals without a particularized exercise of discretion through which it determines that detention of an individual would prevent harm to the community or further some other important governmental interest Congress has delegated to the INS. *See also* C. Gordon and S. Mailman, 1 *Immigration Law and Procedure* § 1.03[7][d] (1988)("the alien in deportation proceedings may be detained or required to post bond only upon a finding that he is a threat to the national security or likely to abscond.").

[4] Thus, we must hold that aliens have a fundamental right to be free from governmental detention unless there is a determination that such detention furthers a significant governmental interest. That right is secured by the Constitution in its enumerated guarantee of habeas corpus to all individuals, including aliens, to test the validity of their detention through judicial scrutiny of the basis for confinement at the hands of the government. *See Salerno*, 481 U.S. 739; *Carlson*, 342 U.S. 524; *Wong Wing*, 163 U.S. 228.

B. *Plaintiffs' Interests as Children*

The plaintiffs are not only aliens; they are also minors. The INS contends that this factor materially changes the nature of their liberty interest, thereby rendering the detention policy reasonable and appropriate. We therefore turn to the question of what effect the juvenile status of these plaintiffs may have on the analysis of their liberty interests and the protections that must be given to those interests.

[5] The Constitution protects the rights of children to due process of law in conjunction with any deprivation of liberty. *In re Gault*, 387 U.S. 1 (1967). While a child accused of an offense may be subject to pretrial detention based on a determination that release is not safe for the child, such a determination has been held to meet the mandates of due process only where made by a neutral and detached official, with the justifications for detention clearly stated. *Schall v. Martin*, 467 U.S. 253 (1984). This holding is in keeping with the general rule that freedom from institutional confinement should be the norm, from which any deviation must be supported with specific reasons. As one set of commentators has observed, a child's "right to be treated in the manner least restrictive to the child's liberty . . . has its roots in the well-settled concept that, while constitutional rights may be restricted by the state for legitimate purposes, the restriction must be no greater than necessary to achieve these purposes." R. Horowitz and H. Davidson, *Legal Rights of Children* § 10.10 at 431 (1984). This proposition flows from the Supreme Court's general pronouncement that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (footnotes omitted). Under these principles, governmental confinement of a child to an institution should be a last resort.

Policies constructed to deal with the confinement of children at both the state and federal levels have recognized the practical need to avoid institutional detention where less restrictive means are available. It is the states, rather than the federal government, which are primarily responsible for child welfare issues. State courts have articulated the view that institutional confinement should be used only when another type of placement such as foster care is not possible. *See, e.g., R.P. v. State*, 718 P.2d 168 (Alaska App. 1986) (state must prove by a preponderance of the evidence that less restrictive alternatives are not possible); *In re John H.*, 48 A.D.2d 879, 369 N.Y.S.2d 196 (1975) (other options must first be fully explored). In addition to protecting any constitutional interests of the children, this avoidance of institutionalization is seen to serve their best interests. *See generally* S. Davis, *Rights of Juveniles* § 6.3 (1990) (discussing states' attempts to ensure that a child benefits in some way from whatever type of placement is ultimately chosen).

[6] Congressional policy, where relevant, also favors avoidance of the institutionalization of juveniles. The federal government does have the occasion to process juvenile offenders when, for example, they violate federal laws or commit crimes on Indian reservations. In such situations, the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031 *et seq.*, governs the treatment of the offenders. That Act's provisions regarding detention specify that it should occur in "a foster home or community based facility" instead of an institution, if possible. 18 U.S.C. § 5035 (regarding pre-disposition detention); 18 U.S.C. § 5039 (regarding detention after disposition). These provisions evidence an understanding that the juvenile's liberty should be curtailed only by the least restrictive means necessary to achieve the purpose at hand, and that the interests of juveniles and of society are best served by keeping such offenders in homes rather than in institutions whenever practicable.

[7] The foregoing analysis compels the conclusion that, just as the plaintiffs' entitlement to liberty absent a valid, particularized basis for confinement does not diminish due to their alienage, their minority does not materially change the nature of that entitlement. The INS is therefore incorrect when it asserts that plaintiffs have no fundamental liberty interest at stake. The INS is also incorrect in asserting that to prevail, the plaintiffs must be able to find in the Constitution itself, or law interpreting the Constitution, an express recognition of a "substantive due process right to be released to an unrelated adult." Such release is not the constitutional interest being secured. It is the remedy the district court imposed after ruling that the defendant's policy unconstitutionally interfered with plaintiffs' interest in freedom from unjustified governmental detention.

Whether the imposition of such a remedy was appropriate depends upon whether the detention serves a significant federal governmental purpose. It is to that issue that we now turn.

C. *Government Purposes Involved*

This case is unprecedented in that it involves post-arrest detention of persons who have not been convicted of any crime, do not pose a risk of flight, and who have not been determined to present any threat of harm to themselves or to the community. Whatever purposes detention serves, they do not relate to punishment, to the need for attendance at further proceedings, or to avoidance of an identifiable risk of harm. *Contrast Salerno*, 481 U.S. 739; *Schall*, 467 U.S. 253; *Carlson*, 342 U.S. 524.

The INS articulates two reasons for the detention. First, the INS suggests that the child's interests would be better served by detention than by release to a responsible adult whose living environment the INS does not have the means to investigate. Second, it asserts that the policy is necessary to protect it from potential liability in the event some harm should befall the child after release.

[8] The INS does not articulate any legal basis for its position that these are valid INS concerns. The first flies in the face of the Supreme Court's ruling in *Gault* that children should be treated in a manner least restrictive of liberty. It also expresses a view contrary to the Supreme Court's decision in *Schall*, which required a foreseeable risk of harm to justify detention. While the Supreme Court in *Schall* recognized that a child, because of a lack of maturity, should have some adult custody and care, 467 U.S. at 265, it did not remotely suggest that there may be a presumption in favor of governmental detention as serving the best interests of the child.

[9] The INS in essence maintains, however, that we should not look behind their articulation of concerns because we must defer to any such articulation. Agencies are, of course, entitled to some deference when they make determinations that relate to an area of their special expertise. *See United States v. Shimer*, 367 U.S. 374, 383 (1961). In the immigration field, then, courts owe deference to decisions of the INS where its special experience and authority in the area of alienage are called into play. *See Carlson*, 342 U.S. at 540-41.

[10] The justifications asserted here, however, relate to child welfare and the potential liability of child welfare agencies. Child welfare is not an area of INS expertise and its decisions in this area are not entitled to any deference. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 114-15 (1976) (court does not defer to agency determination in area outside of agency's expertise). Nor does this policy carry out any express congressional directive. Rather, the policy is contrary to Congress' determination that institutional detention of juveniles is disfavored. *See* 18 U.S.C. §§ 5035; 5039. One of the very reasons the INS gives for detaining the plaintiffs is that it does not have the expertise, and Congress has not given it the resources, to do the kind of evaluation of foster care facilities that state child welfare agencies do on a routine basis. The INS reasons that since it is unable to do such an evaluation, the best interests of the child must lie in detention rather than in release. The Constitution requires the opposite conclusion. *See Gault*, 387 U.S. 1. We therefore hold that the INS may not determine that detention serves the best interests of members of the plaintiff class in the absence of affirmative evidence that release would place the particular child in danger of some harm.

[11] Our conclusion that the INS cannot maintain a blanket policy of detention thus does not absolve the INS from the responsibility of making individualized decisions concerning the fate of children it has arrested. Due process requires a particularized exercise of discretion in conjunction with the decision to grant or deny release to any alien. *See Carlson*, 342 U.S. at 542. It is, of course, within the purview of the INS to determine whether or not the person available to assume custody will ensure the child's attendance at future proceedings. It is also within the purview of the INS to determine on the basis of the particular case whether release of the child poses a danger to the community or could result in harm to the child. The blanket refusal to make individualized determinations in the guise of administrative expediency, however, cannot pass constitutional muster. *See, e.g., Reed v. Reed*, 404 U.S. 71, 76-77 (1971)(administrative convenience does not justify a policy that otherwise runs afoul of the Constitution).

The INS' secondary justification for its detention policy is that if it released a child to an unrelated adult based on a determination short of a detailed "home study," it could be subject to liability in the event that some harm befell the child. The INS does not specify the source of such liability.

[12] We find little indication that the INS would be subject to liability for releasing a minor to an unrelated adult without a "home study." Such a "study" is concededly beyond the expertise of the Service. The Supreme Court's holding in *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), would give an individual a

cause of action against the INS for a violation of constitutional rights, an action analogous to the cause of action available through 42 U.S.C. § 1983 against those who violate federal rights under color of state law. The Supreme Court has recently held, however, that a state agency, with far more expertise in child welfare than the INS, could not be held liable under section 1983 for allowing a child to remain in the custody of an adult despite clear evidence that such custody placed the child in danger. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). The Court concluded that the actions of a private citizen could not form a basis for liability of the Department under section 1983. It did not matter, the Court held, that the child had formerly been in state custody, because "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter." *Id.* at 201.[2]

[13] Decisions before and since *DeShaney*, as well as *DeShaney* itself, compel the conclusion that governmental agencies face far greater exposure to liability by maintaining a special custodial relationship than by releasing children from the constraints of governmental custody. *See DeShaney*, 489 U.S. at 200-201 (emphasizing that absence of duty on the part of the state to ensure child's safety arose from the fact that the plaintiff was not in the state's custody at the time of the injury); *Youngberg v. Romeo*, 457 U.S. 307, 316-17 (1982)(when individual is in state custody, state may acquire constitutional duty to ensure individual's safe care); *Lashawn A. v. Dixon*, 762 F. Supp. 959, 996 (D.D.C. 1991)(under *DeShaney* and *Youngberg*, state agency may be liable for constitutional tort where it fails to provide adequately for the safety and well being of children in its custody). We reject the INS' claim that it must detain these children to avoid lawsuits. In so doing, we follow the lead of the Supreme Court, which has recently refused to uphold an argument that possible tort liability justified a policy that violated the rights of individuals, where such liability was "remote at best." *International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1208 (1991).

[2]A state would of course face a somewhat greater threat of liability after releasing a child to the custody of a responsible third party as opposed to the custody of a parent as in *DeShaney*. This is because the state would have acted affirmatively to place the child in a home from which the child had not originally come, as opposed to returning the child to the same home and assuring placement in "no worse position than that in which he would have been had [the state] not acted at all." *Id.* at 201.

We therefore conclude that the first paragraph of the district court's order is an appropriate means to prevent incarceration of juveniles where such incarceration serves no legitimate purpose of the INS. It provides that release to a responsible adult shall occur only if the child would have otherwise been eligible for release to a relative under the challenged policy. It takes into account the need to secure attendance at immigration proceedings, and does not foreclose the ability of the INS to order detention if there are other, valid reasons for detention. In addition, by specifying that where there is no relative or legal guardian available release may be made to a "responsible" party, it allows room for the INS to make the necessary determination of whether a party who is willing to assume custody of the child is fit to do so.

D. *Procedural Due Process and Part Three of the District Court's Order*

From the beginning of this litigation the parties have disputed whether the determination of what process is due in conjunction with the decision to detain members of the plaintiff class should be made pursuant to *Gerstein*, 420 U.S. 103, or *Mathews*, 424 U.S. 319. In *Gerstein*, the Court determined that a "timely judicial determination" was a mandatory prerequisite to pretrial detention in the criminal context. 420 U.S. at 126. In *Mathews*, the Court articulated a three-factor analysis designed to be applicable generally to questions of due process in conjunction with administrative actions. A reviewing court must consider first the private interest that the action

affects, second the risk that the procedures currently utilized will result in an erroneous deprivation of that interest and the extent to which that risk could be lessened by the addition of more safeguards, and third the government's interest in maintaining the current procedures. 424 U.S. at 335. The plaintiffs have urged that *Gerstein* be followed, while the INS has argued that *Mathews* provides the proper mode of analysis.

[14] Because we have held that the plaintiffs' interest in freedom from detention requires that the decision to detain be made only in conjunction with a neutral and detached determination of necessity, we must affirm Part Three of the district court's order regardless of whether we apply *Mathews* or *Gerstein*. In so doing, we note that under current regulations, the INS is already required to maintain the mechanisms for providing review by an Immigration Judge of any decision to detain an alien or of conditions imposed on the release of such alien, if the alien requests such a hearing. *See* 8 C.F.R. § 242.2(d). The only new requirements that Part Three of the district court's order places on the INS are that, if the alien is a child, such a hearing must be held regardless of whether the alien requests it, and the determination at the hearing must include an inquiry into whether any non-relative who offers to take custody represents a danger to the child's well being. The first of these additional requirements is reasonable because the members of the plaintiff class, as children, are less capable than others of understanding what they are waiving by failing to request a hearing. The second is reasonable in light of the private interest at stake. We therefore conclude that Part Three of the district court's order provides the appropriate procedural safeguards for the deprivation here at issue, and accordingly uphold it.

IV. *CONCLUSION*

The district court correctly held that the blanket detention policy is unlawful. The district court's order appropriately requires children to be released to a responsible adult where no relative or legal guardian is available, and mandates a hearing before an immigration judge for the determination of the terms and conditions of release.

The majority panel opinion is VACATED and the order of Judge Kelleher is AFFIRMED in all respects.

TANG, Circuit Judge, concurring:

I concur wholeheartedly in the majority's judgment and I concur in the majority opinion insofar as it goes. I write separately to emphasize my belief that the liberty interest at issue — freedom from governmental detention and restraint — is a fundamental right expressly protected by the fifth amendment to the Constitution. Indeed, freedom from governmental restraint is the core, the very crux of any governmental system dedicated to preserving the integrity and inviolability of the individual. I write separately also to highlight the two distinct deprivations of liberty occasioned by the INS's policy.

A. *The Right at Issue*

The original panel opinion in this case and the current dissent denominate the right at issue as the "right to be released to unrelated adults." This characterization of the children's liberty interest stands the Constitution on its head. It presumes the government's right to detain and requires children, who have committed no offense greater than being *suspected* of being deportable, to prove their entitlement to release. Even assuming that non-textual rights need to be carefully articulated, there is no reason to afford "liberty" — language right out of the Constitution's text — such a cramped interpretation.

I agree with the majority's conclusion that one textual source of the right to freedom from governmental restraint is

the Constitution's habeas corpus guarantee. U.S. Const. art. I, § 9. The majority's analysis of the constitutional basis for the right at issue is not complete, however.

Physical freedom from governmental detention and restraint — liberty in its most elemental form — is a fundamental constitutional right guaranteed by the due process clause of the fifth amendment. This freedom from governmental restraint is both a substantive right and an entitlement to certain procedural protections when the government acts to deprive a person of physical liberty.

A recent acknowledgment of the substantive due process right to freedom from governmental restraint can be found in *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989). In *DeShaney*, the Supreme Court expressly stated:

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf — through incarceration, institutionalization, or other similar restraint of personal liberty — which is the "deprivation of liberty" triggering the protections of the Due Process Clause.

Id. at 200.

The *DeShaney* court's observation was not novel. Numerous precedents already recognized the individual's fundamental right to freedom from restraint. *See, e.g., United States v. Salerno*, 481 U.S. 739, 749 (1987) ("Respondents [invoke] . . . the 'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial. Such a 'general rule' may freely be conceded. . . ."); *Youngberg v. Romeo*, 457 U.S. 307, 309, 316, 319 (1982) (Court recognizes "substantive right[ ] under the Due Process Clause" to "freedom from bodily restraint" and

observes that "[i]n other contexts, the existence of such an interest is clear in the prior decisions of this Court. Indeed, '[l]iberty from bodily restraint always has been recognized as the core of liberty protected by the Due Process Clause from arbitrary governmental action,' " (quoting *Greenholtz v. Inmates, Nebraska Penal & Correctional Complex*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part))); *Parham v. J. R.*, 442 U.S. 584, 600 (1979) ("It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment.").[1]

These cases recognize explicitly what our constitutional jurisprudence historically has acknowledged implicitly through presumptions and assumptions about the relationship between government and the governed in this country. Liberty is the norm; arrest, detention, or restraint by the state is the exception. To operate otherwise makes a mockery of "government of the people, by the people." Some of our most cherished rights — freedom of speech and of religion, the right to vote, travel, and to be free from unreasonable searches and seizures — would mean nothing if we had to live under the heavy hand of government.

The strict burdens that the Constitution imposes on government's efforts to deprive individuals of their liberty reveal that freedom from governmental restraint is a fundamental right and the cornerstone of democratic government. Government may not incarcerate a person unless it proves that person's guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). Government may not arrest and detain persons absent probable cause to believe a crime has been

[1]Indeed, the Supreme Court's recent opinion in *Cruzan v. Director, Missouri Dep't of Health* implicitly acknowledges this substantive right when it affirms the individual's right, under the due process clause of the fourteenth amendment, to refuse unwanted medical treatment. _ U.S. _, 110 S. Ct. 2841, 2851 (1990).

committed by them. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). The brief delay in physical freedom occasioned by a stop-and-frisk cannot be imposed absent a reasonable and particularized suspicion of danger. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The operative assumption in our society is that government may not intrude into the private sanctuary of the individual. Exceptions will be made if, and only if, the state makes a very strong showing of necessity.

To reduce liberty, as the original panel and the dissent suggest, to nothing more than an entitlement to certain procedural protections and thereby to burden the children with showing a "right to release" ignores the very substance of the Bill of Rights. The Bill of Rights, including the fifth amendment, is our country's blueprint for individual freedom. It maps out limits beyond which the government may not step. Our conception of liberty should thus be drawn in terms of what government may not do (restrain) rather than in terms of what children must do (show entitlement to release).

To see the right in strictly procedural terms fails to recognize that the genesis of these procedures and presumptions is our Constitution's fundamental belief in the sovereignty of the individual. It is this principle that defines the substantive right to liberty, to freedom from governmental restraint. The rules and presumptions mandated by procedural due process are not themselves "liberty." Rather, they are the indispensable guarantees and requirements of the substantive right to freedom from governmental restraint. Liberty under the due process clause is thus both a process and a condition, and it is a right with which the children who brought this action are endowed.[2]

[2]The dissent and the original panel attach significant weight to Justice Scalia's statement in *Cruzan*, ___ U.S. at ___, 110 S. Ct. at 2859 (Scalia, J., concurring), that the due process clause "does not protect individuals against deprivations of liberty *simpliciter*. It protects them against deprivations of liberty 'without due process of law.'" Yet no other member of the Supreme Court joined Justice Scalia's straitened reading of the fifth amendment.

B. *Procedural Due Process*

Defining the right at issue only begins our constitutional inquiry. That a right is fundamental does not mean that it is inviolable. *See, e.g., Youngberg*, 457 U.S. at 319-20 (liberty interest protected by substantive due process is not absolute). Just as government may on occasion limit speech or religious practices, so may government restrict or deny physical liberty to some extent, upon making the constitutionally-mandated showing of necessity. We thus must determine whether the limitations imposed by the INS on the children's liberty comport with the substantive and procedural components of the fifth amendment's due process clause.

Much of the unease occasioned by the INS's policy and the original panel's opinion derives from the fact that the INS imposes conditions on a child's release before there is even a neutral and independent review of its authority to detain a child (and, concomitantly, to limit her release). This puts the cart before the horse. We cannot fairly discuss the INS's ability to condition the children's release or its interest in ensuring the children's return and safety until the INS has established its authority to detain the children in the first instance. Unlike the majority, I turn therefore to the procedural due process issue before addressing the constitutionality of the release conditions.

Much of the parties' debate focuses on whether *Gerstein v. Pugh*, 420 U.S. 103, or *Mathews v. Eldridge*, 424 U.S. 319 (1976), prescribes the appropriate framework for the procedural due process analysis. I agree with Judge Rymer's conclusion that *Mathews* governs. Deportation is a civil, not a criminal, proceeding. *See Carlson v. Landon*, 342 U.S. 524, 537-38 (1952). The Supreme Court has repeatedly invoked *Mathews* to test the constitutionality of civil deprivations of liberty. *See, e.g., Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (INS exclusion proceedings); *Parham*, 442 U.S. at, 599-600 (commitment of children to mental health facility);

institution of such a practice, moreover, will relieve INS law enforcement officers of the duty to review their fellow officers' arrests to determine whether a prima facie case for deportability exists.

Given the substantial liberty interest involved, the proven record and constant risk of error, and the failure of the INS to articulate anything more than vague and unsubstantiated objections to neutral review, I conclude that the due process clause requires the INS promptly to afford detained children an impartial and detached review of their detention. At such a hearing, the burden must be on the INS to demonstrate the propriety of detention. *Gallinot*, 657 F.2d at 1023 ("It is the state, after all, which must ultimately justify depriving a person of a protected liberty interest . . . .").

C. *Conditions on Release*

Once the INS has demonstrated before a neutral and detached decisionmaker a prima facie case of deportability, the INS's legitimate interests in ensuring that child's return for future hearings and, to some extent, that child's safety entitle it to impose conditions on the child's release. Those conditions, however, may not restrict the child's liberty any more than is necessary to achieve the INS's stated goals of ensuring return and safety.

I wholeheartedly agree with the majority's holding that the regulation's prohibition on release to responsible third parties cannot survive scrutiny under the due process clause. Where, as here, the children detained have not individually been shown to be a flight risk, a threat to the community or to themselves, or guilty of any crime, governmental restrictions on liberty must be narrowly tailored to promote the government's articulated interests.

As the majority aptly demonstrates, the INS has not shown that precluding release to child welfare agencies, church groups, immigration rights' groups, and other responsible third parties increases the risks of flight or injury to the child. Unsubstantiated speculation that flies in the face of the historic record of successful releases to third parties cannot outweigh the children's compelling liberty interest. On the other hand, the tragic consequences of prolonged detention are readily discernible. Nor are the INS's liability concerns sufficient to justify confined detention. As the majority notes, the legal liability accompanying prolonged detention greatly exceeds the INS's unproven and overblown apprehensions about legal exposure after release to a responsible third party.

CONCLUSION

While the majority and I differ to some extent in our analyses of the constitutional issues presented, our points of agreement are much more numerous. I believe that the children's fundamental right to freedom from government detention has its roots, not only in the Constitution's guarantee of habeas corpus, but also in the fifth amendment's protection against deprivations of liberty without due process. I also agree with the majority's reasoning and conclusions concerning the conditions on release and procedural due process. I write separately on these issues only to emphasize that we are dealing with the constitutionality of two distinct deprivations of liberty — the initial decision to detain and secondly the conditions imposed upon release after detention. Only when the initial and most drastic deprivation of liberty has been accomplished in a manner that comports with the Constitution can we then address the legality of the INS's release conditions.

NORRIS, Circuit Judge, concurring:

I join Judge Schroeder's opinion for the *en banc* court, but write separately to say that the INS' policy of incarcerating children pending deportation hearings rather than releasing

appropriate circumstances be subordinated to the State's *parens patriae* interest in preserving and promoting the welfare of the child." *Schall*, 467 U.S. at 265 (emphasis supplied). Here the INS has no *parens patriae* interest to weigh against the juvenile's liberty interest. The dissent casts the INS as a parent, but I see only a jailer.

Finally, the mere incantation of Congress' plenary power over immigration policy should not be the siren song that leads us astray from applying settled due process principles to the facts of this case. Congress' broad power to fashion immigration policy no more authorizes the INS to hold people without due process than a state's sovereign power to pass criminal laws authorizes the imprisonment of people without due process. By invoking Congress' power to set standards of deportability as an excuse for the detention of children pending hearings on their deportability under those standards, the dissent blurs the distinction between the enactment of immigration laws and the enforcement of those laws. I know of no authority for the dissent's boundless description of the "judiciary's limited judicial role" in reviewing all "immigration decisions" or any action it can relegate to "the immigration context." *See* dissenting op. (Wallace, C.J.) at 10834-35. In applying due process principles, we balance "interests," not "contexts."

The very cases that the dissent cites for limiting judicial review of all "immigration decisions" recognize the crucial distinction that the dissent ignores. "In the enforcement of . . . [immigration policies], the Executive Branch of the Government must respect the procedural safeguards of due process . . . . [even if] the formulation of these policies is entrusted exclusively to Congress." *Fiallo v. Bell*, 430 U.S. 787, 792 n. 4, at 793 (1977), *quoting Galvan v. Press*, 347 U.S. 522 (1954). Thus the cases cited by the dissent are inapposite in a case involving the detention of children during the process of enforcing the immigration laws. For example, *Adams v. Howerton*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982), involved judicial deference to a congressional decision to deny immigration preferences to partners in same sex relationships. *Galvan v. Press*, 347 U.S. 522, 531 (1954), and *Harisiades v. Shaughnessy*, 342 U.S. 580, 589-90 (1952), upheld statutes making Communist Party members deportable. Finally, *Fiallo v. Bell*, 430 U.S. 787, 792 (1977), upheld a statute denying immigration preferences to persons whose mothers are aliens, but whose fathers are citizens or lawful permanent residents. None of these cases involved the procedures followed by the INS in enforcing the immigration laws passed by Congress.

In sum, the deprivation of the children's liberty is so plain, and the government's interest in detaining them so trivial, that the due process violation could not be more clear-cut.

RYMER, Circuit Judge, concurring in the judgment in part and dissenting in part:

I agree with the majority that this case is particularly troubling. The thought of prolonged detention of children who have done nothing more than to be in this country illegally, and to be without a parent or relative willing to come to their rescue, touches a raw nerve in us all. Even so would we be sickened were one of these children to be precipitously released to abuse, neglect or worse.[1] A constitutionally appro-

[1]Obviously amici present no such risk. Neither the district court's order nor the majority's opinion, however, would limit release to organizations of their caliber. "Responsible adult party" is left undefined; a financially responsible adult may not be morally responsible, and vice versa. Nor does the order restrict release to a *legally* responsible adult, by contrast with 8 C.F.R. § 242.24(b)(4), which requires an unrelated adult to whom a juvenile may be released to execute an agreement to care for the juvenile's well-being. *See also* § 242.24(b)(3) (imposing a similar requirement on a person designated by the parent or legal guardian to take custody of a detained juvenile in their absence). So the district court's order also leaves open the possibility of release to an adult who appears to be morally and financially responsible, but whose legal responsibility for care and presence lacks teeth and is unenforceable.

priate balance must therefore be struck between the alien minors' interest in freedom from institutional restraint and the government's responsibility for their safety.

I write separately even though I agree with much of the majority's bottom line, because I believe the case can be decided more narrowly and in a way that will safeguard valuable rights more effectively than the district court's order. I part company with both the district court and the majority to the extent they hold that the Constitution substantively requires release to any responsible adult who will promise to bring the minor to future hearings, and I disagree that a probable cause hearing is constitutionally required for juveniles held in deportation proceedings. Instead, I conclude that current INS procedures are constitutionally insufficient to afford an alien juvenile the process she is due when it has been determined that she may be released from INS custody, but that she has no parent, guardian, adult relative, or person designated by a parent or guardian to assume custody. Without assurance of an early determination by a neutral hearing officer of whether to release the juvenile under these circumstances, and absent an outside limit on the length of time the juvenile may continue to be held even though it has been determined that she is eligible for release, the risk that the child will be unduly detained outweighs the government's remaining interests in maintaining custody and assuring well-being.

The Due Process Clause of the Fifth Amendment assures that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." The Supreme Court has held that

> the Due Process Clause protects individuals against two types of government action. So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' Rochin v California, 342 US 165, 172, 96 L Ed 183, 72 S Ct 205, 25 ALR 1396 (1952), or interferes with rights 'implicit in the concept of ordered liberty,' Palko v Connecticut, 302 US 319, 325-326, 82 L Ed 288, 58 S Ct 149 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. Mathews v Eldridge, 424 US 319, 335, 47 L Ed 2d 18, 96 S Ct 893 (1976). This requirement has traditionally been referred to as 'procedural' due process.

United States v. Salerno, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

The district court's judgment does not indicate which component was violated. To the extent its order requires a substantive change in the regulation—directing release to a "custodian, conservator, or other responsible adult party" who promises to bring the minor to future hearings, I infer that the court believed § 242.24(b)(4) runs afoul of due process on substantive grounds; I assume it also found the regulation wanting on procedural due process grounds since it ordered an administrative hearing to determine probable cause for the minor's arrest and need for restrictions on her release.

While Flores does contend that the minors' interest in personal liberty is a fundamental constitutional right that substantively overrides the INS restriction on release of children, in her brief to this court and at oral argument she concedes that the district court's order may be seen as wholly procedural and could be affirmed on procedural grounds. Because I agree that the INS's regulation falters for lack of minimum procedures comporting with due process, I see no need to reach more broadly at this time.[2]

[2]Section 242.24(b)(4) appears to assume that the INS has made no determination that detention is required to ensure timely appearance or safety. While release to an unrelated adult is not mandatory, as it is to a

The fifth amendment protects physical freedom by requiring that the government satisfy rigorous procedural safeguards before taking it away. Procedural fairness has traditionally been tested under *Mathews v. Eldridge*, 424 U.S. 319, 334-335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The Court restated the framework for analysis in *Landon v. Plasencia*, 459 U.S. 21, 103 S. Ct. 321, 74 L. Ed. 2d 21 (1982), an immigration case, as follows:

> The constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances. In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.

Id. at 34 (citations omitted).

The alien juveniles' interest has considerable weight: they stand to continue losing freedom from INS restraint even though the INS will not have determined that they need to be detained for reasons of flight or safety.[3] On the other hand, the government's interests in the well-being of minors in its custody and in assuring that these children not be entrusted to the care of an unqualified person are likewise strong. In addition,

> [t]he Government's interest in efficient administration of the immigration laws at the border also is weighty. Further, it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature. The role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy.

Id. at 34-35 (citations omitted).

Flores challenges the regulation on four scores: (1) lack of a probable cause hearing on deportability; (2) lack of a prompt custody hearing; (3) failure to impose a burden of

parent, guardian or adult relative under § 242.24(b)(1), the regulation itself creates a liberty interest in freedom from continued restraint. The dispositive question for us, therefore, is whether the procedures by which the INS decides if it should release a juvenile to the custody of an unrelated adult survive facial challenge.

Assuming that alien juveniles have a protected liberty interest in freedom from institutional restraint such that their failure to be released to a "responsible adult" who promises future appearances triggers substantive due process scrutiny, *see Salerno*, 481 U.S. at 750, their interest "must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody." *Schall v. Martin*, 467 U.S. 253, 265, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984). Thus, their real interest is not in freedom from restraint (detention), but in freedom from a particular kind of limitation on the conditions under which release will be permitted. Because the children are minors, the government's parens patriae responsibilities are implicated and the juveniles' interest in freedom from restraint is therefore less substantial than an adult's and their interest in being released to any "responsible adult" is less substantial than their interest in being released to a parent, guardian or family member with whom they enjoy a natural or legal bond. By the same token, the government's interests in exercising its nearly plenary power over immigration, and discharging its obligation to protect and promote the welfare of juveniles within its custody, are substantial.

[3]Flores also complains of the Catch-22 the regulation creates on account of the fact that parents or adult relatives of alien juveniles may be deterred from coming forward to the INS because they, too, may be here illegally. While there is nothing much for it, the conundrum does to some extent affect the juveniles' opportunity to rejoin their family. *See Landon*, 459 U.S. at 34 (right to rejoin immediate family ranks high among the interests of the individual).

defining the right at issue here as a blanket denial of liberty, thereby granting it a fundamental character, and in ignoring the deference that courts have traditionally paid to immigration laws and regulations. Primarily for these reasons, I respectfully dissent.

I

My first disagreement with the majority is over the liberty right at issue. At oral argument, the alien children argued that the regulation impinged on their right to be free from physical restraint — a right to liberty which they allege is fundamental. The Immigration and Naturalization Service (INS), on the other hand, contended that the right at issue is a nonfundamental right to be released to unrelated adults. Without discussion, the majority adopts the former characterization, a characterization with which I disagree.

Perhaps the insistence on viewing the right at issue as a general "right to liberty" comes from the majority's mistaken characterization of the regulation as a "blanket detention policy." Maj. op. at 10781. As the facts demonstrate, however, the regulation results in no such blanket denial. The regulation does not bar the release of all alien juveniles, but merely those who do not have an identifiable parent, legal guardian or adult relative who can accept custody or designate an appropriate custodian. *See* 8 C.F.R. § 242.24 (1991). Even children whose release is not mandated under the regulation can, in the discretion of the INS, be released to other responsible adults. *See id.* § 242.24(b)(4). Thus, alien children awaiting deportation proceedings are eligible for release to a number of caregivers; the only liberty right denied them is the right to be released to unrelated adults without INS approval.

Given the limited scope of the regulation, I believe the majority errs by concluding that this case involves a "fundamental right to be free from government detention." Maj. op. at 10794. This broad characterization of the right

involved conflicts with the Supreme Court's warning that rights and interests should be defined narrowly for the purposes of substantive due process balancing. *See Bowers v. Hardwick*, 478 U.S. 186 (1986) (*Bowers*) (defining the right at issue as the right to engage in homosexual sodomy, rather than as the more general "right to be let alone"); *Michael H. v. Gerald D.*, 491 U.S. 110, 121-27 & n.6 (1989) (plurality opinion). The majority fails to heed this warning in holding, without persuasive analysis, that the right implicated by the regulation is a general right to liberty.

The need to define the right narrowly is further supported by policy and precedent. No case has been cited to us (and I have found none) in which a court has ever recognized a fundamental *substantive* due process right to physical liberty. Instead, *procedural* due process analysis has traditionally provided adequate protection against any unwarranted deprivations of physical liberty. As Justice Scalia recently stated, "[t]he text of the Due Process Clause does not protect individuals against deprivations of liberty *simpliciter*. It protects them against deprivations of liberty 'without due process of law.' " *Cruzan v. Director, Missouri Department of Health*, 110 S. Ct. 2841, 2859 (1990) (Scalia, J., concurring). To hold otherwise, would subject all physical detentions — in both the immigration context and criminal context — to judicial review under strict scrutiny to insure that their fundamental substantive due process "right to liberty" was not being infringed. Such cannot be the law.

None of the cases cited by the majority support its novel holding that this case involves a "fundamental right to be free from government detention." Maj. op. at 10794. For example, the majority cites a number of habeas corpus cases to establish the unremarkable proposition that aliens may challenge a detention through a habeas corpus proceedings. *See, e.g., Wing Wong v. United States*, 163 U.S. 228, 233-38 (1896) (sentence of one year of hard labor for all deportable aliens may be challenged through habeas corpus petition). However,

the existence of a forum is quite separate from the definition or analysis of the right at issue, and these cases provide no support for the majority's application of heightened scrutiny to invalidate the INS regulation. *Compare id.* at 235 ("[w]e think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid").

The majority also relies heavily on *Carlson v. Landon*, 342 U.S. 524 (1952) (*Carlson*), and *United States v. Salerno*, 481 U.S. 739 (1987) (*Salerno*), for the proposition that this case implicates the "fundamental right" to be free from detention. However, in both of the cited cases, the Supreme Court upheld, rather than struck down, a challenged detention. In addition, neither support the conclusion that the limited detention policy at issue here need satisfy any form of heightened scrutiny.

In *Carlson*, the Supreme Court held that INS detention based on Communist party membership did not violate due process. To reach this conclusion, the Court first held that Congress had authorized the Attorney General to make discretionary decisions concerning detention pending deportation. 342 U.S. at 540. Relying on the legislative history of the statute, the Court stated that "Congress [intended] to make the Attorney General's exercise of discretion presumptively correct and unassailable except for abuse." *Id.* Applying this test, the Court concluded that the discretion was "certainly broad enough" to justify the challenged detention. *Id.* at 541.

The majority argues that *Carlson* holds that "the INS cannot detain individuals without a particularized exercise of discretion through which it determines that detention of an individual would prevent harm to the community or further some other important governmental interest." Maj. op. at 10794. But such an inference is unsupported by either the reasoning, or the result in the case. As stated earlier, *Carlson* did not strike down the regulation, it found it well within the

INS's discretion. In discussing the factors that supported the INS's exercise of discretion, the Court explicitly stated that such discretion "[could] only be overriden where it is clearly shown that it 'was without a reasonable foundation.'" *Carlson*, 342 U.S. at 541; *see also id.* (detention need not be justified by "specific acts" performed by detained individual). Thus, *Carlson* actually undermines, rather than supports, the majority's broad characterization of the right at issue in this case and consequent application of heightened scrutiny to invalidate the INS regulation.

The majority also cites *Salerno* in support of its holding that the INS must come forward with "significant" reasons to justify its limited detention policy. But *Salerno*, which upheld pretrial detention under the Bail Reform Act of 1984, 18 U.S.C. § 3141 *et seq.*, is not on point. First, *Salerno* involved a *blanket detention* of certain dangerous felons — the regulation at issue in this case is much narrower as it only prohibits release of alien minors to unrelated adults without INS approval. *Compare* 18 U.S.C. § 3142 *with* 8 C.F.R. § 242.24 (1991). Second, the Court's due process analysis in *Salerno* was geared primarily toward the rights of adult citizens facing detention in the criminal context. *See Salerno*, 481 U.S. at 747-52. The situation before us in this case involves the rights of juvenile aliens facing detention in the civil context, whose rights are not necessarily coextensive with those of adults. *See infra*, sec. II. In addition, *Salerno* did not squarely hold that freedom from pretrial detention was a fundamental right. Instead, the Court stated that "we cannot categorically state that pretrial detention offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 481 U.S. at 751 (quotations and citations omitted). Thus, *Salerno* also does not support the majority's assumption that the detention policy implicates a "fundamental right" to liberty.[1]

[1]The additional cases cited by the two separate concurrences also do not support the majority's application of heightened scrutiny to invalidate the

cal in nature and therefore vested in the political branches. *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976) (*Diaz*); *Jean v. Nelson*, 727 F.2d 957, 965 (11th Cir. 1984) (en banc) (*Jean*), *aff'd on other grounds* 472 U.S. 846 (1985). Although the executive and legislative branches in theory possess concurrent authority over immigration, "[i]n practice . . . the comprehensive character of the INA vastly restricts the area of potential executive freedom of action, and the courts have repeatedly emphasized that the responsibility for regulating the admission of aliens resides in the first instance with Congress." *Jean*, 727 F.2d at 965; *see also United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950).

The Supreme Court has long recognized Congress's paramount power to control matters of immigration. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (*Fiallo*); *Galvan v. Press*, 347 U.S. 522, 531 (1954); *Carlson*, 342 U.S. at 534; *Harisiades v. Shaughnessy*, 342 U.S. 580, 589-90 (1952). Congressional power in this area is plenary; the Court has repeatedly stressed that " 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo*, 430 U.S. at 792, *quoting Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909). In exercising its broad power over immigration and naturalization, " 'Congress regularly makes rules that would be unacceptable if applied to citizens.' " *Id.*, *quoting Diaz*, 426 U.S. at 80. Because Congress's power over immigration is plenary and political in nature, the exercise of that power is subject " 'only to narrow judicial review.' " *Id.*, *quoting Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (*Hampton*); *Diaz*, 426 U.S. at 81-82.

The plenary power of Congress and the narrowness of judicial review in the immigration context is reflected in the Supreme Court's teaching that any substantive due process rights aliens might have are extremely limited. For example, in *Harisiades*, the Court upheld the deportation, under the Alien Registration Act of 1940, of legally resident aliens who had been members of the Communist Party before passage of the Act. While acknowledging that the Act "stands out as an extreme application of the expulsion power," the Court rejected the aliens' argument that the Congress's power to deport was "so unreasonably and harshly exercised" that the Act violated the due process clause. 342 U.S. at 588. Similarly, in *Galvan*, the Court upheld a statute that authorized deportation of legally resident aliens on the grounds that they had once been members of the Communist party, stating that "[w]e cannot say that this classification by Congress is so baseless as to be violative of due process." 347 U.S. at 529. In subsequent cases dealing with both equal protection and substantive due process challenges under the fifth amendment, the Supreme Court reaffirmed the limited judicial role in reviewing immigration decisions. *Fiallo*, 430 U.S. at 792-93 & n.4; *Hampton*, 426 U.S. 99-103.

As a result of the judiciary's limited role in the immigration context, we have held that even if the right at issue is fundamental in character, the court should not apply strict scrutiny review to an immigration regulation. In *Adams v. Howerton*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982), we considered the argument that substantive due process required the application of strict scrutiny to an immigration statute dealing with spouses. The homosexual plaintiffs argued that, as interpreted to apply only to heterosexual marriages, the statute violated their right to same-sex marriage, a right they contended was fundamental. We stated that "[w]e need not . . . reach the question of the nature of the claimed right or whether such a right is implicated in this case. *Even if it were*, we would not apply a strict scrutiny standard of review to the statute. [In the immigration area] the decisions of Congress are subject only to limited judicial review." *Id.* at 1041 (emphasis added and footnote omitted). Therefore, following *Adams*, and the extensive Supreme Court precedent in this area, even if I were to agree with the majority that this case involves a fundamental right, I would still apply rational review to the evaluate the regulation.

The majority's assertion that the INS is unlikely to suffer any liability also seems odd in light of its holding that the INS must release minors to unrelated adults only after "mak[ing] the necessary determination of whether a party who is willing to assume custody is fit to do so." Maj. op. at 10800-01. In light of the majority's apparent acceptance of the INS's claim that it lacks the resources or expertise to conduct these studies, maj. op. at 10799, its imposition of a duty to do so seems likely to result in liability. At any rate, given our deferential review, I would defer to the INS's rationale for the policy rather than seeking out reasons to discredit it.

B.

In addition to failing to give required deference to the INS regulation, the majority accords no significance to the fact that this case involves detention of children, rather than adults. Because the INS's reasons for the policy relate directly to their responsibility to protect minors, I believe that the Supreme Court's teachings regarding the constitutional rights of minors are relevant to our analysis.

As the majority correctly points out, there is no doubt that children are " 'persons' under our Constitution" who possess "fundamental rights which the State must respect." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969); *In re Gault*, 387 U.S. 1, 13 (1967) ("whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"). However, the majority fails to include in its analysis the Supreme Court's often stated teaching that constitutional rights of children are not coextensive with those of adults. *See, e.g., Schall v. Martin*, 467 U.S. 253, 263-66 (1984) (*Schall*); *Bellotti v. Baird*, 443 U.S. 622, 633-39 (1979) (plurality opinion) (*Bellotti*); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1978).

The Court has specifically recognized the narrower scope of juveniles' liberty interest. In *Schall*, the Court held that the state may restrict a child's liberty interest in order to secure that child's welfare. In upholding the constitutionality of a New York statute authorizing the pretrial detention of certain juveniles, the Court stated:

> The juvenile's . . . interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial . . . . But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae* interest in preserving and promoting the welfare of the child."

467 U.S. at 265 (citations omitted), *quoting Santosky v. Kramer*, 455 U.S. 745, 766 (1982); *see also Bellotti*, 443 U.S. at 634 (stating three reasons why "the constitutional rights of children cannot be equated with those of adults," including "the peculiar vulnerability of children").

In my view, the teachings of *Schall* and *Bellotti* are particularly relevant to the facts of this case. The INS's regulation governing the detention of minors is based at least in part upon a concern for the "peculiar vulnerability" of alien minors. *See Bellotti*, 443 U.S. at 635 ("the State is entitled to adjust its legal system to account for children's vulnerability . . ."). Thus, the INS's regulation is an exercise of governmental power which takes into account the need to provide for children "[when] parental control falters." *Schall*, 467 U.S. at 265.

The majority ignores these cases, and instead relies on *In re Gault*, for the proposition that "children should be treated

in a manner least restrictive of liberty." Maj. op. at 10798. *In re Gault* dealt with a procedural, rather than substantive, due process challenge, and I am at a loss to find any categorical statement concerning the liberty rights of children in the text of the opinion. *Compare In re Gault*, 387 U.S. at 13 (stating that bill of rights does not apply in same manner to children as adults). Moreover, since *In re Gault* was decided, the Supreme Court has made it clear that childrens' liberty interests are not identical to those of adults. *Schall*, 467 U.S. at 265.

The majority also relies heavily on federal and state policies which, it claims, "favor[ ] avoidance of institutionalization of juveniles." Maj. op. at 10796. However, even assuming the existence of such policies, they are irrelevant to our analysis. The question presented here is what the Constitution requires, not what federal and state governments favor. *See DeShaney*, 489 U.S. at 202-03 (drawing distinction between duties imposed by state legislature and duties embodied in the Constitution). I therefore fail to see how legislative policy "compels the conclusion that" the plaintiffs' status as minors is irrelevant to our assessment of their constitutional rights. Maj. op. at 10796.

Thus, I believe that the Supreme Court's rulings regarding the diminished liberty interests of minors should be factored into our constitutional analysis. The majority therefore errs in asserting that there is "no legal basis" for the INS's professed concern for the best interests of alien minors. Maj. op. at 10797. Because the INS's statement of reasons for the limited detention policy are concerns that the Supreme Court has already found legitimate, this is additional evidence that the challenged regulation is reasonable.

III

In the final section of the opinion, the majority upholds the district judge's ruling that a minor taken into custody must be given "an administrative hearing to determine probable cause for his arrest and the need for any restrictions placed upon his release." Although the district judge's ruling apparently rested on the procedural due process test embodied in *Gerstein v. Pugh*, 420 U.S. 103 (1975), *see Flores*, slip op. at 10798, the majority sees no need to determine whether *Gerstein* applies in this case. Instead, the majority concludes that the new procedural requirements are logically connected to its holding that the INS may not detain minors solely on the ground that there is no adult or legal guardian to care for the child. Maj. op. at 10801-02.

The majority states that requiring detention hearings does not materially alter existing INS regulations. Maj. op. at 10802. In reaching this conclusion, the majority holds that the district judge's order only imposes two additional requirements on the INS. First, the order makes detention hearings mandatory, when the hearings were previously only available at the request of the minor. *Id.*; *see* 8 C.F.R. § 242.2(c) & (d) (1991). Second, the order requires that the hearing include an inquiry into whether a nonrelative may be appropriate to take custody of the child. Maj. op. at 10802.

As stated earlier, I do not agree that the INS regulation at issue here violates substantive due process. I therefore cannot join in the majority's imposition of these new procedural requirements. However, the majority's analysis is problematic for a second reason — it fails to acknowledge, much less analyze, the possible broader implications of the judge's order. This issue needs to be clarified.

The district judge held that "[a]ny minor taken into custody" shall be given "an administrative hearing to determine probable cause for his arrest." Under current INS procedures, minors arrested without a warrant are entitled to have probable cause reviewed by an immigration official "without unnecessary delay." *See* 8 U.S.C. § 1357(a)(2). Because this procedure existed prior to the *Flores* litigation, the panel spec-

ulated that the district judge intended to impose an additional requirement that the probable cause hearing take place before an immigration judge. Otherwise, the majority pointed out that "the injunction [would be] deprive[d] of much practical effect." *Flores*, slip op. at 10798.

By holding that the judge's order will not materially affect INS procedures, the majority implicitly rejects the panel's original assumption and holds instead that the current arrest and probable cause requirements satisfy the judge's order. Any other interpretation of the order is inconsistent with the majority's refusal to engage in any due process analysis. Therefore, despite the broad language of the judge's order, the majority's affirmance of that order should not be read to require any change in these procedures.

I also do not read the majority's opinion as imposing any additional requirements on the INS in terms of timing and execution of the detention hearings. The majority references the current hearing procedures as adequate to safeguard the interests of the minors. *See* maj. op. at 10802. Therefore, with the exception of the new requirement that such hearings be held automatically, the majority opinion does not entail any alteration in current INS procedure.

The procedural component of the district judge's order is potentially quite sweeping. For this reason, I adhere to my original position, as stated in the panel majority opinion, that we should remand the case for a determination of what procedures are constitutionally required under *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See Flores*, slip op. at 10797-802 (discussing appropriate test for procedural due process analysis).